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## THE NEW EQUAL PROTECTION

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### INTRODUCTION

Our nation is increasingly beset with pluralism anxiety. Commentary from both the right<sup>1</sup> and the left<sup>2</sup> has expressed the fear that we are fracturing into fiefs that do not speak with each other. That fear has a basis in fact, as the nation confronts “new” kinds of people (introduced to the country through immigration) or newly visible people (introduced to the country by social movements). We are, for instance, arguably the most religiously diverse country in world history.<sup>3</sup> The visibility of women, sexual minorities, and individuals with disabilities has skyrocketed. The U.S. Census Bureau now acknowledges sixty-three possible racial identities.<sup>4</sup> No end lies in sight.

This pluralism anxiety has transformed civil rights. As the number of groups in the public limelight has increased, so has anxiety about the group-based identity politics on which civil rights have historically

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<sup>1</sup> See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987) (criticizing the proliferation of multiculturalism and feminism at universities); PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* (1997) (arguing that America’s successful pattern of immigrant assimilation — one that enables immigrants to retain their ethnic traditions — is threatened by both multiculturalism and nativism); Samuel P. Huntington, *The Erosion of American National Interests*, *FOREIGN AFF.*, Sept./Oct. 1997, at 28, 33–34 (“The ideologies of multiculturalism and diversity . . . deny the existence of a common culture in the United States, denounce assimilation, and promote the primacy of racial, ethnic, and other subnational cultural identities and groupings. They also question a central element in the American Creed by substituting for the rights of individuals the rights of groups, defined largely in terms of race, ethnicity, gender, and sexual preference.”).

<sup>2</sup> See, e.g., DAVID A. HOLLINGER, *POSTETHNIC AMERICA* (2000); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (W.W. Norton & Co. rev. & enlarged ed. 1998) (1991).

<sup>3</sup> See DIANA L. ECK, *A NEW RELIGIOUS AMERICA* 4–5 (2001).

<sup>4</sup> See ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, *CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN* 3 tbl.1, 4 tbl.2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

been based. Many Americans view civil rights as an endless parade of groups clamoring for state and social solicitude. Even traditional liberals decry the nation's "balkanization," calling us back to the ideals of integration and assimilation.<sup>5</sup>

The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups,<sup>6</sup> curtailed it for already covered groups,<sup>7</sup> and limited Congress's capacity to protect groups through civil rights legislation.<sup>8</sup> The Court has repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of equality doctrine as we have known it.

The end of traditional equality jurisprudence, however, should not be conflated with the end of protection for subordinated groups. Squeezing law is often like squeezing a balloon. The contents do not escape, but erupt in another area, in a dynamic that Professor Louis Henkin once dubbed "constitutional displacement."<sup>9</sup> The Court's commitment to civil rights has not been pressed out, but rather over to collateral doctrines. Most notably, the Court has moved away from group-based equality claims under the guarantees of the Fifth<sup>10</sup> and Fourteenth Amendments<sup>11</sup> to individual liberty claims under the due process guarantees of the Fifth<sup>12</sup> and Fourteenth Amendments.<sup>13</sup> This

<sup>5</sup> See HOLLINGER, *supra* note 2; SCHLESINGER, *supra* note 2.

<sup>6</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (denying heightened scrutiny to classifications based on mental disability); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (*per curiam*) (denying heightened scrutiny to age-based classifications); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (denying heightened scrutiny to classifications based on indigency).

<sup>7</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (foreclosing disparate impact causes of action under equal protection guarantees of the Constitution).

<sup>8</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (constraining congressional ability to enact civil rights legislation pursuant to Section 5 of the Fourteenth Amendment).

<sup>9</sup> Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1417 (1974) (using the phrase to refer to how enumerated rights did the work of substantive due process in the period when the latter doctrine had been discredited during the New Deal).

<sup>10</sup> The Fifth Amendment contains no equal protection clause. However, the Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to run against the federal government through the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (maintaining that the holding of *Brown v. Board of Education*, 347 U.S. 483 (1954), was enforceable against schools run by the federal government in the District of Columbia through the operation of the Fifth Amendment's Due Process Clause). See generally Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71 (Terry Eastland ed., 1995).

<sup>11</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>12</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

<sup>13</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

move reflects what academic commentary has long apprehended — that constitutional equality and liberty claims are often intertwined.<sup>14</sup> Professor Laurence Tribe uses the phrase “legal double helix”<sup>15</sup> to describe this “Substantive Due Process–Equal Protection synthesis.”<sup>16</sup> Following Tribe’s convention, I refer to such hybrid equality/liberty claims as “dignity” claims.<sup>17</sup> Based on whether the liberty or the equality dimension of the hybrid claim is ascendant, I call it the “liberty-based” or “equality-based” dignity claim.

The introduction of a third overarching term like “dignity” that acknowledges the links between liberty and equality is overdue. Too much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees. In practice, the Court does not abide by this distinction. The Court has long used the Due Process Clauses to further equality concerns, such as those relating to indigent individuals,<sup>18</sup> national origin minorities,<sup>19</sup>

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<sup>14</sup> See, e.g., Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutionary Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 380–81 (1985); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 106 (2007); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1696 (2008) [hereinafter Siegel, *Dignity and the Politics of Protection*]; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 276–77 (1992) [hereinafter Siegel, *Reasoning from the Body*]; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004).

<sup>15</sup> Tribe, *supra* note 14, at 1898 (noting that case law pertaining to due process, properly understood, is a “narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix”).

<sup>16</sup> *Id.* at 1902; see *id.* at 1902–16 (describing the synthesis).

<sup>17</sup> *Id.* at 1898. As the text suggests, I am indebted to Tribe’s important essay linking equality and liberty and associating both terms with the concept of human dignity. For my argument that Tribe’s essay was presaged by his litigation strategy, see Kenji Yoshino, *Tribe*, 42 TULSA L. REV. 961 (2007). Where this Article diverges from Tribe’s work is in introducing the idea of pluralism anxiety as a force that is shutting down traditional equality jurisprudence and increasing pressure on the Court to use due process as a vehicle for vindicating equality concerns. In addition, while Tribe focuses on the difference between a narrow vision of due process and a broader liberty-based dignity jurisprudence (a due process jurisprudence that internalizes equality concerns), I focus on the difference between traditional equality jurisprudence and that liberty-based dignity jurisprudence.

<sup>18</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (using due process liberty analysis to protect indigent individuals).

<sup>19</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (using due process liberty analysis to protect national origin minorities).

racial minorities,<sup>20</sup> religious minorities,<sup>21</sup> sexual minorities,<sup>22</sup> and women.<sup>23</sup> Conversely, the Court has used the equal protection guarantees to protect certain liberties, such as the right to travel,<sup>24</sup> the right to vote,<sup>25</sup> and the right to access the courts.<sup>26</sup> We need to look past doctrinal categories to see that the rights secured within those categories are often hybrid rights. This Article focuses particularly on the liberty-based dignity claim, because I believe it offers a way for the Court to “do” equality in an era of increasing pluralism anxiety.

This Article’s aim is largely descriptive. I am confident in my descriptive claim that the Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate. I am less confident about the inevitability or desirability of this shift. I therefore turn at the end of the Article to consider such questions in a more provisional register.

In Part I, I describe the nation’s increasing pluralism anxiety. In Part II, I suggest how this anxiety has placed pressure on the Court’s “traditional equality jurisprudence” (which throughout this Article also encompasses its free exercise jurisprudence under the First and Fourteenth Amendments).<sup>27</sup> In Part III, I discuss how the Court has responded to that pressure with a move toward liberty-based dignity claims. In Part IV, I describe the historical antecedents for this use of the liberty-based dignity claim. In Part V, I make a tentative normative assessment of this “new equal protection.”

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<sup>20</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (using due process liberty analysis, alongside equal protection analysis, to protect racial minorities); *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (using due process liberty analysis to protect racial minorities).

<sup>21</sup> See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (using due process liberty analysis to protect religious minorities).

<sup>22</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (using due process liberty analysis to protect gays).

<sup>23</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992) (using due process liberty analysis to protect women’s right to choose to terminate pregnancies); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (same); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (using due process liberty analysis to protect women’s right to use contraception).

<sup>24</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (using equal protection “rights” analysis to protect the right of indigent individuals to travel).

<sup>25</sup> See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (using equal protection “rights” analysis to protect the right of indigent individuals to vote).

<sup>26</sup> See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18–20 (1956) (using equal protection “rights” analysis to protect the right of indigent individuals to access the courts).

<sup>27</sup> The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I. While the amendment of its own force protects free exercise rights only against the federal government, the Court has incorporated the right of free exercise against the states through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

## I. PLURALISM ANXIETY

Our country is consumed with pluralism anxiety, which I define as an apprehension of and about its demographic diversity. Pluralism anxiety flows from at least two sources — “new” kinds of people and “newly visible” kinds of people. While these categories overlap, religion perhaps best exemplifies the former. Professor of comparative religion Diana Eck observes that immigration since the 1970s has “exponentially” expanded the diversity of religions<sup>28</sup>:

Buddhists have come from Thailand, Vietnam, Cambodia, China, and Korea; Hindus from India, East Africa, and Trinidad; Muslims from Indonesia, Bangladesh, Pakistan, the Middle East, and Nigeria; Sikhs and Jains from India; and Zoroastrians from both India and Iran. Immigrants from Haiti and Cuba have brought Afro-Caribbean traditions, blending both African and Catholic symbols and images. New Jewish immigrants have come from Russia and the Ukraine, and the internal diversity of American Judaism is greater than ever before. The face of American Christianity has also changed with large Latino, Filipino, and Vietnamese Catholic communities; Chinese, Haitian, and Brazilian Pentecostal communities; Korean Presbyterians, Indian Mar Thomas, and Egyptian Copts.<sup>29</sup>

Eck believes that the United States is currently the most religiously diverse country in world history: “We have never been here before.”<sup>30</sup>

Pluralism anxiety also derives from the new visibility of historically underrepresented groups. For instance, the percentage of the population that has experienced same-sex desire has presumably not changed dramatically over time. However, the political visibility of gays, lesbians, and bisexuals has grown dramatically over recent decades.<sup>31</sup> Even if a group is not comprised of “new” kinds of individuals, it can still trigger pluralism anxiety if it becomes newly visible.

Because of “new” and “newly visible” groups, the nation has developed an increasing sense of its own pluralism. That sense has engendered significant anxiety across the political spectrum. For some time now, conservative commentators have expressed impatience with the seemingly endless proliferation of identities and identity politics.<sup>32</sup> But the concern transcends political creed. Even liberal lion Professor Arthur Schlesinger Jr. cautioned as early as 1991 against the “disuniting

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<sup>28</sup> ECK, *supra* note 3, at 3.

<sup>29</sup> *Id.* at 3–4.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> See DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD* 13 (1999) (observing that “it seems likely that the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation”).

<sup>32</sup> See, e.g., BLOOM, *supra* note 1, at 94–99; SALINS, *supra* note 1, at 91–108.

of America,”<sup>33</sup> calling for a recommitment to the ideals of assimilation and integration.<sup>34</sup>

Pluralism anxiety also extends beyond the borders of the United States. In a 2001 paper, sociologist Professor Rogers Brubaker argues that pluralism anxiety has triggered the “return of assimilation” in France and Germany, as well as in the United States.<sup>35</sup> His paper maintains that the “differentialist turn” of prior decades — which encompassed open immigration, the autonomy of indigenous peoples, difference feminism, and the affirmation of alternative sexualities — may have “exhausted itself.”<sup>36</sup>

A landmark study published in 2007 by political scientist Professor Robert Putnam further substantiates the link between increased ethnic diversity and increased pluralism anxiety, but also sounds a more hopeful note by examining that link over the short, medium, and long terms.<sup>37</sup> Putnam earned fame with his book *Bowling Alone*,<sup>38</sup> which argued that the United States had suffered a massive decline in social capital since the 1960s.<sup>39</sup> His 2007 study discusses the causal role ethnic diversity plays in this decline in social capital. The study is based on a nationwide survey of roughly 30,000 individuals in forty-one “very different” communities across the United States.<sup>40</sup>

Putnam begins his analysis by observing that “[e]thnic diversity will increase substantially in virtually all modern societies over the next several decades, in part because of immigration.”<sup>41</sup> He then describes the effects of that burgeoning ethnic diversity over different time spans. He observes that in the short to medium run, “immigration and ethnic diversity challenge social solidarity and inhibit social capital.”<sup>42</sup> Putnam finds that in areas of greater ethnic diversity respondents show:

- (1) “lower confidence in local government”;
- (2) “lower political efficacy”;
- (3) lower frequency of voter registration;
- (4) less expectation of group cooperation;
- (5) “less likelihood of working [together] on a community project”;

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<sup>33</sup> See SCHLESINGER, *supra* note 2, at 17.

<sup>34</sup> *Id.* at 19–20.

<sup>35</sup> Rogers Brubaker, *The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the United States*, 24 ETHNIC & RACIAL STUD. 531 (2001).

<sup>36</sup> *Id.* at 532–33.

<sup>37</sup> Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 138–39 (2007).

<sup>38</sup> ROBERT D. PUTNAM, *BOWLING ALONE* (2000).

<sup>39</sup> *Id.* at 18–24.

<sup>40</sup> Putnam, *supra* note 37, at 144.

<sup>41</sup> *Id.* at 138.

<sup>42</sup> *Id.*

- (6) lower likelihood of charitable giving;
- (7) “fewer close friends[hips]”;
- (8) “less happiness and lower perceived quality of life”; and
- (9) more time watching television.<sup>43</sup>

One of Putnam’s most interesting findings is that greater diversity decreases trust *within* ethnic groups as well as *across* them.<sup>44</sup> At least in the short to medium term, people “hunker down,” or “pull in like a turtle,” when confronted with greater diversity.<sup>45</sup> They bowl alone.

In a more cheerful vein, Putnam observes that in the long run, ethnic diversity is a social asset. He posits that immigration-based diversity will increase creativity, stimulate economic growth, and help offset the impending fiscal effects of the retirement of the baby boom generation.<sup>46</sup> Diversity is also a net benefit in part because over the longer run, “successful immigrant societies create new forms of social solidarity and dampen the negative effects of diversity by constructing new, more encompassing identities.”<sup>47</sup> Putnam offers religion as a form of “bridging social capital” that has eroded racial distinctions over time.<sup>48</sup> He recalls that it used to be proverbial among sociologists that “11:00 am Sunday is the most [racially] segregated hour in the week.”<sup>49</sup> Putnam notes that while fifty-three percent of churchgoers in America still report that all or almost all of their congregations are of the same race, there is also evidence of improvement over historical segregation.<sup>50</sup> Younger individuals and those attending “evangelical megachurches . . . report significantly more racial integration,” suggesting that even greater integration is to come.<sup>51</sup> Putnam views “the central challenge for modern, diversifying societies” to be the creation of “a new, broader sense of ‘we.’”<sup>52</sup>

While other studies have challenged Putnam’s claim that racial heterogeneity causes a decline in social capital, the major critiques of Putnam’s study use different countries (namely Canada and European nations) as their case studies.<sup>53</sup> As such, they do not directly engage

<sup>43</sup> *Id.* at 149–50.

<sup>44</sup> *Id.* at 148, 150–51.

<sup>45</sup> *Id.* at 149 (internal quotation marks omitted).

<sup>46</sup> *Id.* at 140–41.

<sup>47</sup> *Id.* at 138–39.

<sup>48</sup> *Id.* at 160–61.

<sup>49</sup> *Id.* at 161 (internal quotation marks omitted).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 139.

<sup>53</sup> See Maurice Gesthuizen, Tom van der Meer & Peer Scheepers, *Ethnic Diversity and Social Capital in Europe: Tests of Putnam’s Thesis in European Countries*, 32 SCANDINAVIAN POL. STUD. 121, 135 (2009) (contending that Putnam’s hypothesis is untenable for European societies); Mai B. Phan, *We’re All in This Together: Context, Contacts, and Social Trust in Canada*, 8 ANA-

with Putnam's data, which is drawn from the United States. In contrast, a major 2000 study of the relationship between racial heterogeneity and social capital in the United States comes to the same conclusion as Putnam later reached.<sup>54</sup> This Article proceeds on the premise that ample evidence supports Putnam's hypothesis about the United States. The Article makes no claims about whether the dynamic described here (that pluralism anxiety is driving the high court away from group-based equality jurisprudence and toward universal liberty jurisprudence) can be generalized beyond our borders, hoping that later work will take up that important comparative project.

Putnam's study articulates a challenge to which the United States must respond. If diversity dramatically decreases social capital in the short to medium run, this should be a national concern that cannot be answered with anodyne calls to "celebrate diversity." Stopping the decline of social capital by creating a "new, broader sense of 'we'" should be a task for all American institutions, both governmental and nongovernmental.

This Article considers how the United States Supreme Court might help create that "new, broader sense of 'we'" through its constitutional jurisprudence. Obviously, the Court is but one actor among many. Yet the Court remains one of the nation's most respected governmental entities.<sup>55</sup> As such, it represents an essential piece of Putnam's puzzle.

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LYSES SOC. ISSUES & PUB. POL'Y 23, 46 (2008) (contesting Putnam's thesis based on data drawn from the Canadian census that suggests "[d]iversity itself is not a problem for trust").

<sup>54</sup> See Alberto Alesina & Eliana La Ferrara, *Participation in Heterogeneous Communities*, 115 Q.J. ECON. 847, 850–51 (2000) (finding that survey data drawn from certain localities in the United States supports the conclusion that participation in social activities is significantly lower in more racially or ethnically diverse localities).

<sup>55</sup> A July 2010 survey found that 36% of Americans had either a "great deal" or "quite a lot" of confidence in the Supreme Court and in the presidency while only 11% of Americans did in Congress. *Government*, GALLUP, <http://www.gallup.com/poll/27286/Government.aspx> (last visited Dec. 4, 2010). The numbers were more striking on the negative end of the spectrum: while 18% of survey respondents had "very little confidence" or "no confidence" in the Supreme Court, 37% fell into those categories with respect to the presidency and a full 50% did so with respect to Congress. *Id.* A 2009 Gallup Poll showed that 61% of Americans approved of the way the Supreme Court was handling its job while only 28% disapproved. See Lydia Saad, *High Court to Start Term with Near Decade-High Approval*, GALLUP (Sept. 9, 2009), <http://www.gallup.com/poll/122858/high-court-start-term-near-decade-high-approval.aspx>. This was the highest approval rating garnered by the Court in the Gallup Poll since 2001. *Id.*

Evidence supports the premise that trusted institutions are in fact capable of restoring social cohesion in this manner. See, e.g., Markus Freitag & Marc Bühlmann, *Crafting Trust: The Role of Political Institutions in a Comparative Perspective*, 42 COMP. POL. STUD. 1537, 1544–45 (2009) (drawing on data from the World Values Survey to find support for hypothesis that institutions seen as "incorruptible, nonpartisan, just, and sanctioners of uncooperative behavior" increase "generalized trust").



## II. THE EXHAUSTION OF TRADITIONAL GROUP-BASED EQUAL PROTECTION

Constitutional law does not operate independently of broad irreversible developments in society.<sup>56</sup> Just as the War on Terror has transformed our separation of powers jurisprudence<sup>57</sup> and the internet has transformed our First Amendment obscenity jurisprudence,<sup>58</sup> pluralism anxiety has transformed our civil rights jurisprudence. Under the Supreme Court's own account, pluralism anxiety has pressed the Court away from traditional group-based identity politics in its equal protection and free exercise jurisprudence. In past decades, the Court has restricted these guarantees in at least three ways — it has limited the number of formally protected classifications, it has curtailed its solicitude for classes within already protected classifications, and it has restricted Congress's power to enact antidiscrimination legislation. In justifying these limitations, the Court has insistently cited pluralism anxiety.

### A. *Judicial Limitations on Heightened Scrutiny Classifications*

Under the equal protection guarantees of the Fifth and Fourteenth Amendments, the Court has fashioned a framework of tiered scrutiny. That framework distinguishes between classifications that draw “heightened scrutiny”<sup>59</sup> and classifications that draw “rational basis review.”<sup>60</sup> Heightened scrutiny generally results in the invalidation of state action.<sup>61</sup> In contrast, rational basis review generally results in the

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<sup>56</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 354 (2009) (arguing that the ostensibly “countermajoritarian” Court hews closely to public opinion in practice); Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5–7 (1983) (contending that judicial opinions are embedded in a “nomos,” or normative universe, distinguishable from judicial decisionmaking); Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (maintaining that constitutional jurisprudence has a “dialectical relationship” with a broader national culture).

<sup>57</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (noting that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war,” the Court’s understanding of Congress’s war powers “may unravel”).

<sup>58</sup> See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 602–03 (2002) (Stevens, J., dissenting) (observing that the “contemporary community standards” doctrine of First Amendment obscenity law is on a collision course with dissemination of materials on the internet, which is, by definition, national in scope).

<sup>59</sup> I use “heightened scrutiny” to encompass both strict and intermediate scrutiny.

<sup>60</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1 to 16-2, at 401–04, § 16-6, at 413, § 16-32 to 16-33, at 518–28 (2d ed. 1988).

<sup>61</sup> The conventional academic wisdom has been that strict scrutiny is “fatal in fact.” See Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “fatal in fact”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL*

validation of state action.<sup>62</sup> The words “scrutiny” and “review” suggest an examination rather than a result. Yet in this jurisprudence, looks can kill.

The Supreme Court has formally accorded heightened scrutiny to classifications based on five characteristics — race,<sup>63</sup> national origin,<sup>64</sup> alienage,<sup>65</sup> sex,<sup>66</sup> and nonmarital parentage.<sup>67</sup> All classifications based on other characteristics — including age,<sup>68</sup> disability,<sup>69</sup> and sexual orientation<sup>70</sup> — currently receive rational basis review. Litigants still

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LAW § 16-30, at 1089 (1st ed. 1978) (describing strict scrutiny as a “virtual death-blow”). Intermediate scrutiny is quite close to strict scrutiny, especially after the case of *United States v. Virginia*, 518 U.S. 515 (1996). See Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (observing that intermediate scrutiny even before *Virginia* “operated quite strictly ‘in fact’”). The Supreme Court has reminded us that state action can survive both forms of scrutiny. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding race-based affirmative action program under strict scrutiny); *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (upholding sex-specific naturalization law under intermediate scrutiny). Such cases, however, remain the exceptions that prove the rule of general invalidation.

<sup>62</sup> See *TRIBE*, *supra* note 60, § 16-2, at 1442–43 (“The traditional deference *both* to legislative purpose *and* to legislative selections among means continues . . . to make the rationality requirement largely equivalent to a strong presumption of constitutionality.”).

<sup>63</sup> See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>64</sup> See *Oyama v. California*, 332 U.S. 633, 645–46 (1948) (subjecting a land-transfer statute that discriminated on the basis of national origin to heightened scrutiny). The application of heightened scrutiny to national origin–based classifications dates back to *Korematsu v. United States*, 323 U.S. 214 (1944), which subjected legislation and an executive order excluding individuals of Japanese ancestry from the U.S. West Coast to the “most rigid scrutiny.” *Id.* at 215–16.

<sup>65</sup> See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (subjecting legislation that conditioned welfare benefits on citizenship to heightened scrutiny). The strict scrutiny granted to classifications based on alienage is subject to two qualifications. First, this level of scrutiny does not apply to federal alienage classifications. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81–83, 87 (1976) (holding that, because the Constitution grants Congress authority over issues of alienage, congressional use of the alienage classification draws only rational basis review). Second, even with respect to state uses of the alienage classification, strict scrutiny does not apply when core governmental functions are at issue. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 297, 299–300 (1978) (upholding New York requirement that police officers be citizens on the ground that policing is “one of the basic functions of government,” *id.* at 297).

<sup>66</sup> See *Virginia*, 518 U.S. at 530–31 (subjecting gender-based discrimination in education to intermediate scrutiny, which the Court took to require an “exceedingly persuasive justification” on the part of the state, *id.* at 530 (quoting *United States v. Virginia*, 52 F.3d 90, 92 (4th Cir. 1995) (internal quotation marks omitted)); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (subjecting gender-based discrimination in a statute regulating the sale of alcohol to intermediate scrutiny).

<sup>67</sup> See *Trimble v. Gordon*, 430 U.S. 762, 766–67, 769 (1977) (applying heightened scrutiny to a statute that permitted children born in wedlock, but not children born out of wedlock, to inherit from their intestate fathers).

<sup>68</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam) (holding that a mandatory retirement age of fifty for police officers was subject to rational basis review because it implicated neither a fundamental right nor a suspect class).

<sup>69</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

<sup>70</sup> See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (avoiding the question of whether a classification based on sexual orientation merits heightened scrutiny by finding that a Colorado constitutional amendment repealing ordinances prohibiting discrimination based on sexual orientation violated equal protection “in the most literal sense”).

argue that new classifications should receive heightened scrutiny.<sup>71</sup> Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977.<sup>72</sup> At least with respect to federal equal protection jurisprudence, this canon has closed.<sup>73</sup>

<sup>71</sup> See, e.g., Brief of the National Lesbian & Gay Law Ass'n et al. as Amici Curiae in Support of Petitioners at 3–4, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152348, at \*3–4 (arguing that classification based on sexual orientation should draw heightened scrutiny); Brief of Appellant at 40–46, *United States v. Watson*, 483 F.3d 828 (D.C. Cir. 2007) (No. 04-3090), 2006 WL 338618 (arguing for application of heightened scrutiny to peremptory challenges of blind jurors); Appellant's Reply Brief at 2, *Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004) (No. 03-7149), 2004 WL 1536069, at \*2 (arguing that youth as a class should be accorded intermediate scrutiny); Brief of Amici Curiae American College of Obstetricians & Gynecologists [sic] et al. in Support of Plaintiffs-Appellees at 35–36, *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001) (No. 00-6104), 2000 WL 33978992, at \*35–36 (arguing for heightened scrutiny with respect to the Secretary of the Department of Health and Human Services' interpretation of legislation denying prenatal care to undocumented women on the grounds that it harms a class of children based on their mothers' status).

<sup>72</sup> *Trimble*, 430 U.S. at 766–76.

<sup>73</sup> I emphasize the *federal* constitutional jurisprudence because there is of course a distinct body of state constitutional jurisprudence. Almost every state has an equal protection clause or its equivalent, most of which track the wording of the Fourteenth Amendment. Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599, 604 (2003). In some cases, state courts interpreting state constitutions have gone further in their grants of heightened scrutiny than have federal courts interpreting the United States Constitution. For instance, classifications based on mental disability have been accorded intermediate scrutiny under the New Mexico Constitution's equal protection guarantee. See *Breen v. Carlsbad Mun. Sch.*, 120 P.3d 413, 422–23 (N.M. 2005). Connecticut also grants disability-based classifications strict scrutiny pursuant to a specific provision of its constitution. See CONN. CONST. art. 1, § 20 (“No person shall be denied the equal protection of the law . . . because of religion, race, color, ancestry, national origin, sex or physical or mental disability.”) (amended 1984). Sexual orientation classifications have received strict scrutiny under California jurisprudence, see *In re Marriage Cases*, 183 P.3d 384, 441–43, 452 (Cal. 2008) (according strict scrutiny to orientation-based classifications in legalizing same-sex marriage under the California Constitution), and quasi-suspect scrutiny under Connecticut jurisprudence, see *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (according quasi-suspect scrutiny to orientation-based classifications in legalizing same-sex marriage under the Connecticut Constitution). Tennessee jurisprudence has referred to age as a suspect class. See *Nat'l Gas Distribs. v. Sevier Cnty. Util. Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999) (“Equal protection requires strict scrutiny of a legislative classification . . . when the classification . . . operates to the peculiar disadvantage of a suspect class (e.g., age or race).” (quoting *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994)) (internal quotation marks omitted)). As the case did not involve an age-based classification, however, the case's description of age as a suspect class must be regarded as dictum.

Notwithstanding the instances above, state courts appear not to have built far above the Supreme Court's federal equal protection jurisprudence. As one commentator has observed: “In most areas, state courts have been inclined to parallel the Fourteenth Amendment paradigm with minor modifications introduced along the way.” Friedelbaum, *supra*, at 629. My main reason for bracketing state equal protection jurisprudence is simply one of scope. However, I would be remiss if I did not also note that the slack created by the federal equal protection jurisprudence has not been fully picked up by the states' equal protection jurisprudence.

The closure of the heightened scrutiny canon can be fairly attributed to pluralism anxiety. As early as 1973, then-Justice Rehnquist voiced qualms about the Court's heightened scrutiny jurisprudence. Dissenting in a case that granted such scrutiny to alienage classifications, he wrote:

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" different from the "majority." I cannot find, and the Court does not cite, any constitutional authority for such a "ward of the Court" approach to equal protection.<sup>74</sup>

Justice Rehnquist's allusion to "insular and discrete" minorities refers to the famous footnote four of *United States v. Carolene Products Co.*<sup>75</sup> Viewed by many as the fountainhead of the heightened scrutiny framework for minority groups,<sup>76</sup> that footnote stated that "prejudice against discrete and insular minorities" might "call for a correspondingly more searching judicial inquiry"<sup>77</sup> because such minorities would not be able to protect themselves in the political process.<sup>78</sup> Justice Rehnquist's criticism of this formulation was that, in a diverse society, such a subjective standard would lead to arbitrary interventions on the part of the Court.

In 1985, the Court adopted Justice Rehnquist's view. In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>79</sup> the Court confronted a case in which a zoning ordinance prevented homes for the mentally retarded from being built in certain areas.<sup>80</sup> The Court declined to grant classifications discriminating against individuals with mental retardation heightened scrutiny.<sup>81</sup> Justice White, writing for the majority, reasoned as follows:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be

<sup>74</sup> *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

<sup>75</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>76</sup> See, e.g., GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 542 (10th ed. 1980) (attributing the tiered structure of judicial review under the Equal Protection Clause to this note's "pervasive influence"). See generally Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

<sup>77</sup> *Carolene Products Co.*, 304 U.S. at 153 n.4.

<sup>78</sup> *Id.* at 152 n.4.

<sup>79</sup> 473 U.S. 432 (1985).

<sup>80</sup> See *id.* at 436.

<sup>81</sup> *Id.* at 435.

difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>82</sup>

Justice White not only invoked pluralism anxiety — the “variety of other groups” represented by “the aging, the disabled, the mentally ill, and the infirm” — but also signaled that the courts, which must provide a “principled way” of making distinctions among such groups, might be particularly susceptible to that anxiety.

The claim that the canon has closed on heightened scrutiny classifications must be tempered by acknowledging the Court’s use of a more aggressive form of rational basis review. While the Court has not made this distinction, academic commentary has correctly observed that “rational basis review” takes two forms: ordinary rational basis review and “rational basis with bite review.”<sup>83</sup>

Historically, rational basis review has operated as a residual category — that is, if a classification does not receive heightened scrutiny, it receives rational basis review. The residual character of rational basis review explains its lenity. After all, most laws create distinctions between groups — between ophthalmologists and opticians,<sup>84</sup> say, or between dairy farmers and purveyors of “filled milk.”<sup>85</sup> If every legislative distinction received active scrutiny from a court, then the courts would indeed sit as countermajoritarian “superlegislatures.” The courts simply cannot perform the Sisyphean task of independently testing the fairness of every governmental distinction. Justice Holmes gestured toward this reality when he called equal protection arguments “the usual last resort of constitutional arguments.”<sup>86</sup> As he put it, “the law does all that is needed when it does all that it can.”<sup>87</sup>

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<sup>82</sup> *Id.* at 445–46.

<sup>83</sup> See generally Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005).

<sup>84</sup> See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 486 (1955).

<sup>85</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>86</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927). Holmes, who was writing before the Court inaugurated the tiered system of scrutiny, was speaking of the equal protection jurisprudence in general, not the rational basis with bite standard in particular. The limited number of heightened scrutiny classifications means his comment may no longer apply to the equal protection jurisprudence as a whole. However, the statement still captures the impracticability of according robust review to state action drawing only rational basis review.

<sup>87</sup> *Id.*

As a doctrinal matter, rational basis review requires only that state action be “rationally related to furthering a legitimate state interest.”<sup>88</sup> Even that deferential formulation fails adequately to capture the lenity of ordinary rational basis review. In post-1937 cases, the Court stated it would uphold state action if it could imagine any possible rationale for the state’s action.<sup>89</sup> In other words, even if the legislature had provided no rationale or an inadequate rationale, the state action would be upheld so long as the Court could supply one. Because judges could imagine many things, ordinary rational basis review was tantamount to a free pass for legislation.<sup>90</sup>

In some cases, however, the Court has invalidated legislation under rational basis review, suggesting a newer rational basis with bite standard. In the 1973 case of *United States Department of Agriculture v. Moreno*,<sup>91</sup> the Court struck down legislation involving “hippies,” stating that laws evincing a “bare congressional desire to harm a politically unpopular group” would not pass rational basis review.<sup>92</sup> This analysis fastened on the word “rational,” holding that legislation motivated by animus, by nature against reason, cannot survive rational basis review. A dozen years later, the *Cleburne* Court itself deployed such review to strike down a zoning ordinance that fenced out individuals with mental disabilities.<sup>93</sup> In the 1996 case of *Romer v. Evans*,<sup>94</sup> the Court invalidated an antigay state constitutional amendment, quoting the *Moreno* language.<sup>95</sup> Such applications depart from the usual deference associated with rational basis review.<sup>96</sup> For this reason, commentators have correctly discerned a new rational basis with bite standard in such cases.<sup>97</sup>

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<sup>88</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam).

<sup>89</sup> See, e.g., *Williamson*, 348 U.S. at 487 (hypothesizing rationales that a state legislature “might have” or “may have” had in enacting a statute to validate provisions distinguishing between ophthalmologists and optometrists on the one hand and opticians on the other); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (hypothesizing rationales that a state legislature might have had and stating that “[i]t would take a degree of omniscience which we lack to say” such a rationale was not the reason local authorities enacted the regulation).

<sup>90</sup> For a canonical critique of this approach, see Gunther, *supra* note 61, who maintains that the Court should be “less willing to supply justifying rationales by exercising its imagination.” *Id.* at 21.

<sup>91</sup> 413 U.S. 528 (1973).

<sup>92</sup> *Id.* at 534.

<sup>93</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449–50 (1985).

<sup>94</sup> 517 U.S. 620 (1996).

<sup>95</sup> *Id.* at 634–35 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ‘[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.’” (second and third alterations in original) (quoting *Moreno*, 413 U.S. at 534)).

<sup>96</sup> See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955).

<sup>97</sup> See sources cited *supra* note 83.

Yet the importance of this rational basis with bite standard should not be exaggerated. Rational basis with bite review is *not* equivalent to formal heightened scrutiny. Subsequent lower courts have not understood *Cleburne* to require the application of anything more than traditional rational basis review to disability-based classifications.<sup>98</sup> Nor have they interpreted *Romer* to bar other governmental discrimination on the basis of sexual orientation.<sup>99</sup> The Court has also reaffirmed the salience of the formal distinction between heightened scrutiny and rational basis review under its section 5 jurisprudence, implying that Congress has more power to legislate with respect to classifications drawing heightened scrutiny than with respect to classifications drawing only rational basis review.<sup>100</sup> The inability of new groups to have discrimination against them receive formal heightened scrutiny has profoundly negative effects on their equal protection claims.

Despite its thirty-year hiatus, it is certainly possible that the Court may give formal heightened scrutiny to another classification or two in addition to the five that currently benefit from this form of judicial review. The fact that state courts have given legislation burdening gays strict<sup>101</sup> or “quasi-suspect”<sup>102</sup> scrutiny under their state constitutions,

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<sup>98</sup> See, e.g., *Frazier v. City of Grand Ledge*, 135 F. Supp. 2d 845, 852 (W.D. Mich. 2001) (distinguishing *Cleburne* to uphold a state statute burdening individuals with disabilities); *DeSisto Coll., Inc. v. Town of Howey-in-the-Hills*, 706 F. Supp. 1479, 1503 (M.D. Fla. 1989) (distinguishing *Cleburne* in upholding a failure to accommodate learning-disabled students under rational basis review).

<sup>99</sup> See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864–66 (8th Cir. 2006) (distinguishing *Romer* in upholding a state constitutional ban on same-sex marriage under rational basis review); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 826–27 (11th Cir. 2004) (distinguishing *Romer* in upholding a Florida statute prohibiting adoption by homosexuals under rational basis review); *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (distinguishing *Romer* in upholding a city charter amendment denying protection to gays); *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (distinguishing *Romer* in upholding the termination of a lesbian attorney for having engaged in a same-sex commitment ceremony under rational basis review).

<sup>100</sup> Compare *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (permitting Congress more leeway to legislate on matters of sex discrimination because sex is a heightened scrutiny classification), with *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–68 (2001) (permitting Congress less leeway to legislate on matters of disability discrimination because disability is not a heightened scrutiny classification).

<sup>101</sup> *In re Marriage Cases*, 183 P.3d 384, 441–42 (Cal. 2008) (according strict scrutiny to orientation-based classifications in legalizing same-sex marriage under the California Constitution). This case was superseded by a constitutional amendment that withdrew the right to marry from same-sex couples. See CAL. CONST. art I, § 7.5. However, the amendment does not necessarily supersede the California Supreme Court’s determination that sexual orientation classifications draw strict scrutiny under the California Constitution.

<sup>102</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (according quasi-suspect scrutiny to orientation-based classifications in legalizing same-sex marriage under Connecticut Constitution).

for instance, may inspire federal courts to do the same.<sup>103</sup> But the Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny. So the Court has every incentive to fall back — sooner or later — to the gestalt analysis represented by the rational basis with bite standard. This approach has the virtue of candor: it effectively admits that there is no principled test — in the sense of a mathematical formula — to find groups deserving judicial protection.<sup>104</sup>

<sup>103</sup> As of this writing, many progressives have their eyes on two pending cases relating to same-sex marriage. One struck down a state constitutional amendment that bans same-sex marriage on both due process and equal protection grounds. See *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 WL 3025614, at \*1 (N.D. Cal. Aug. 4, 2010). Although the court stated that classifications of gays met the criteria for heightened scrutiny, it struck down the state constitutional provision under rational basis review, meaning that the heightened scrutiny determination is dictum. *Id.* at \*72. The other case struck down a portion of the federal Defense of Marriage Act on equal protection grounds applying only rational basis review. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010).

<sup>104</sup> The two main tests that the Supreme Court has formulated suffer from serious flaws. First, the *Carolene Products* formulation of “discrete and insular minorities,” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), has often been seen as the fountainhead for heightened scrutiny. See GUNTHER, *supra* note 76, at 542; Ball, *supra* note 76, at 1062 (noting the pervasiveness of the “discrete and insular” formulation). However, as Professor Bruce Ackerman pointed out in a seminal article, it may be that “anonymous and diffuse” groups suffer from more political disabilities than do “discrete and insular” groups. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

Another Supreme Court test asks whether the group has been subjected to historical discrimination, is politically powerless, and is marked by “obvious, immutable, or distinguishing characteristics.” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)). The historical discrimination prong of this test seems unimpeachable. However, the question of how to define political powerlessness is vexing. As an initial matter, one must have an extraordinary amount of political power to be deemed politically powerless by the courts. In grappling with the challenge of how to define political powerlessness, the Justices have cycled among various tests that have led to inconsistent results. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court deemed women to be politically powerless despite their numerosity in the polity because they were “vastly underrepresented in this Nation’s decisionmaking councils.” *Id.* at 686 n.17 (plurality opinion). Four years later, a majority of the Court observed that the fact that Mexican Americans held a “governing majority” did not dispel the presumption of intentional discrimination established by numerical underrepresentation. *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). Under that “underrepresentation” test, individuals with disabilities would be politically powerless. So in denying heightened scrutiny to classifications of individuals with mental disabilities, the Court shifted to a different metric of political powerlessness, observing that the test was whether a group was able to “attract the attention of lawmakers.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985). But under that test, racial minorities, who had a great deal of legislation passed to protect them long before race-based classifications were granted heightened scrutiny in the mid-1900s, should not have received suspect-class status. Nor should women. At the time *Frontiero* was decided, the nation not only had a great deal of ordinary legislation protecting women, but also was close to ratifying the Equal Rights Amendment. See *Frontiero*, 411 U.S. at 692 (Powell, J., concurring in the judgment) (arguing that the Court should not grant suspect class status to women when “state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment”). Finally, *Bowen*’s emphasis on “obvious, immutable, or distinguishing characteristics” is misplaced. I and others have contested the idea that visibility or immutability should be a prerequisite to judicial



Yet even the Court's rational basis with bite protection will ground out at a certain point. Rational basis with bite depends on the idea that governmental "animus" alone is never enough to sustain legislation. But because one person's prejudice is another's principle, this form of rational basis review will still require the Court to privilege some groups over others. The Court will find the task of picking and choosing among groups to be increasingly distasteful as the nation becomes ever more conscious of its diversity. Pluralism anxiety has operated, and will continue to operate, as a serious obstacle to the recognition of classification-specific judicial protections (whether through heightened scrutiny or rational basis with bite review).

### B. Judicial Foreclosure of Disparate Impact

Even with respect to the five established heightened scrutiny classifications, the Court has restricted the ambit of its protections. The 1976 case of *Washington v. Davis*<sup>105</sup> articulated the most significant constraint. The case concerned a written personnel test administered by the District of Columbia Police Department.<sup>106</sup> The results of the test excluded a disproportionate number of African American applicants.<sup>107</sup> Under Title VII of the Civil Rights Act of 1964,<sup>108</sup> which regulates the employment relationship, such a disparate impact would itself require an employer to defend the test with a business justification.<sup>109</sup> However, the Court deemed the case to turn solely on the constitutional issue.<sup>110</sup> Indeed, the Court took the occasion to distinguish between the protections afforded by Title VII and the equal protection guarantee. The *Davis* Court held that, in the constitutional context, disparate impact was not, in and of itself, enough to require a high-

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protection. After all, many forms of passing or conversion are precisely an effect of discrimination rather than an escape from it. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002); see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994) (critiquing immutability as a salient factor for heightened scrutiny). See generally Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998) (arguing that the visibility and immutability requirements create an "assimilationist bias" in equal protection jurisprudence).

<sup>105</sup> 426 U.S. 229 (1976).

<sup>106</sup> *Id.* at 233.

<sup>107</sup> *Id.*

<sup>108</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>109</sup> See *Davis*, 426 U.S. at 246-47 ("Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices."); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>110</sup> When the plaintiffs filed their claim, Title VII did not apply to public employers. *Davis*, 426 U.S. at 238 n.10. Although Title VII was extended in 1972 to cover such employers, the plaintiffs did not amend their complaint to raise the employment discrimination claim. *Id.*

tened level of scrutiny.<sup>111</sup> The Court declared that facially neutral state action would draw only ordinary rational basis review so long as it was not enacted with discriminatory intent.<sup>112</sup>

Standing by itself, the *Davis* decision might not have significantly set back constitutional civil rights. The *Davis* Court acknowledged that disparate impact could still be probative of discriminatory intent.<sup>113</sup> If disparate impact established discriminatory intent, the state action would draw the same level of scrutiny as facial discrimination against that group. The year after *Davis* was decided, the Court listed six ways in which discriminatory intent could be established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>114</sup> Disparate impact on a protected group topped that list.<sup>115</sup>

Two years later, however, in *Personnel Administrator of Massachusetts v. Feeney*,<sup>116</sup> the Court defined “discriminatory purpose” so stringently that it made all the evidentiary bases enumerated in *Arlington Heights*, including disparate impact, almost irrelevant. As the *Feeney* Court put it, “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>117</sup> In other words, it was not enough for plaintiffs to show that legislators *knew* of the disparate impact on a protected group. The disparate impact had to operate as at least a partial incentive for the state action.

In the vast run of cases after *Feeney*, only facial discrimination has drawn heightened scrutiny under the equal protection guarantees. If legislators have the wit — which they generally do — to avoid words like “race” or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.

The *Davis* / *Arlington Heights* / *Feeney* trilogy did not refer to pluralism anxiety. When the Court imported this equal protection framework into the free exercise context, however, the Justices did advert to

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<sup>111</sup> *Id.* at 245–47.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* at 241–42.

<sup>114</sup> 429 U.S. 252, 266–68 (1977) (citing (1) “[t]he impact of the official action,” (2) “[t]he historical background of the decision,” (3) “[t]he specific sequence of events leading up to the challenged decision,” (4) “[d]epartures from the normal procedural sequence,” (5) “[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached,” and (6) “[t]he legislative or administrative history”).

<sup>115</sup> *Id.* at 266.

<sup>116</sup> 442 U.S. 256 (1979).

<sup>117</sup> *Id.* at 279 (citation omitted).

such anxiety, beginning with the 1986 case of *Goldman v. Weinberger*.<sup>118</sup> *Goldman* concerned an Air Force uniform regulation that prevented a servicemember, Rabbi Simcha Goldman, from wearing a yarmulke.<sup>119</sup> The Court acknowledged that the military's regulations had a disparate impact on religiously observant individuals like Goldman.<sup>120</sup> Nonetheless, it did not require the military to accommodate the rabbi's religious observance.<sup>121</sup> To the extent that the Court credited the military's nondiscriminatory reason for its uniform regulation — the promotion of solidarity among servicemembers<sup>122</sup> — its holding appeared to adopt the *Davis* rule. However, the traditional deference the Court accords to the military<sup>123</sup> left open the possibility that the military context played a dispositive role in the case.

A three-Justice concurrence penned by Justice Stevens embraced the *Davis* standard more clearly. Unlike the majority opinion, the concurrence did not rely on military deference. It instead stressed the nondiscriminatory nature of the Air Force regulation, stating that “the rule that is challenged in this case is based on a neutral, completely objective standard” and “was not motivated by hostility against, or any special respect for, any religious faith.”<sup>124</sup> The concurrence also considered an argument made by the government relating to pluralism anxiety, namely that “while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian.”<sup>125</sup> In an interesting turn, Justice Stevens's concurrence elaborated on the government's claim that it would be hard to draw a distinction between a Jew's yarmulke and a Rastafarian's dreadlocks. Justice Stevens observed that it might be all too *easy* for the public to draw a distinction between the familiar and unobtrusive yarmulke and the paraphernalia of other groups.<sup>126</sup> But Justice Stevens nonetheless reached the same conclusion as the government because he worried about the likelihood that the state might protect Judaism more than religions seen as “ex-

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<sup>118</sup> 475 U.S. 503 (1986).

<sup>119</sup> *Id.* at 504–05.

<sup>120</sup> *Id.* at 509 (“Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others.”).

<sup>121</sup> *Id.* at 509–10.

<sup>122</sup> *Id.* at 510 (holding that “those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity”).

<sup>123</sup> See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (“[J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”).

<sup>124</sup> *Goldman*, 475 U.S. at 513 (Stevens, J., concurring).

<sup>125</sup> *Id.* at 512 (quoting *id.* at 519 (Brennan, J., dissenting)) (internal quotation marks omitted).

<sup>126</sup> *Id.* at 512–13.

trema," "unusual," or "faddish."<sup>127</sup> In making this move, Justice Stevens echoed Justice White's contention in *Cleburne* that if the Court were to engage in picking and choosing among religions, politics, rather than principle, would be its guide.<sup>128</sup>

In the 1990 case of *Employment Division v. Smith*,<sup>129</sup> the Court finished importing the *Davis* framework into the free exercise context. The *Smith* Court upheld a denial of unemployment benefits to two members of a Native American church fired for smoking peyote, even though they had done so for sacramental purposes.<sup>130</sup> Writing for the Court, Justice Scalia alluded again to the diversity of the American polity. He maintained that in a "cosmopolitan nation made up of people of almost every conceivable religious preference,"<sup>131</sup> accommodating religious drug use would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."<sup>132</sup>

*Smith* ended an age of innocence. Until then, the Court appeared to believe it could provide religious minorities with accommodations from facially neutral statutes. In the 1963 case of *Sherbert v. Verner*,<sup>133</sup> the Court held that South Carolina could not deny Adell Sherbert, a Seventh-day Adventist, unemployment benefits, even though the state had done so on the facially neutral ground that she had refused paid work.<sup>134</sup> The Court found that Sherbert was entitled to an accommodation because the work would have forced her to break her Sabbath.<sup>135</sup> Similarly, in the 1972 case of *Wisconsin v. Yoder*,<sup>136</sup> the Court held that Wisconsin could not force Amish parents to keep their children in high school until age sixteen.<sup>137</sup> The Court found this requirement would impede the Amish from inculcating their faith in their children.<sup>138</sup>

During this period, the Court appeared relatively free of pluralism anxiety. The Court seemed to believe it could fairly pick and choose among religions. The *Yoder* Court, for instance, repeatedly opined on

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<sup>127</sup> *Id.* at 512 (quoting *id.* at 518 (Brennan, J., dissenting)).

<sup>128</sup> *Cf.* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (noting that laws based on considerations of "race, alienage, or national origin" are "deemed to reflect prejudice and antipathy").

<sup>129</sup> 494 U.S. 872 (1990).

<sup>130</sup> *See id.* at 890.

<sup>131</sup> *Id.* at 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)) (internal quotation mark omitted).

<sup>132</sup> *Id.*

<sup>133</sup> 374 U.S. 398 (1963).

<sup>134</sup> *See id.* at 410.

<sup>135</sup> *Id.* at 403-04.

<sup>136</sup> 406 U.S. 205 (1972).

<sup>137</sup> *See id.* at 207.

<sup>138</sup> *Id.* at 234-36.

the merits of the Amish faith in a manner I think would be unimaginable today. The Court underscored that “the Amish have an excellent record as law-abiding and generally self-sufficient members of society.”<sup>139</sup> It added that “[w]hatever their idiosyncrasies as seen by the majority,” members of the Amish community “are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.”<sup>140</sup> And it noted that “[t]here is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.”<sup>141</sup>

By 1990, when *Smith* was decided, the Court could no longer ignore the “too many groups” problem in the religious context. In a 2006 debate with Justice Breyer, Justice Scalia put his argument in *Smith* more humorously. He recalled a saying that “France is a country with 300 cheeses and two religions. The United States is a country with two cheeses and 300 religions.”<sup>142</sup> Judicial religious accommodation is as impossible in the United States as judicial caseic accommodation would be in France.

The almost absolute foreclosure of disparate impact claims under the equal protection and free exercise guarantees has serious effects on progressive litigation relating to heightened scrutiny classifications. The current framework sharply distinguishes between generally impermissible state action that discriminates against a protected group on its face and generally permissible state action that does not. Yet as Professor Reva Siegel has pointed out, state action that seeks to help historically disadvantaged groups — “affirmative action” programs — are the governmental programs most likely to remain facially discriminatory.<sup>143</sup> In contrast, state action that perpetuates the subordination of historically disadvantaged groups will tend to express itself in facially neutral terms.<sup>144</sup> For this reason, an equal protection jurisprudence that turns formalistically on facial discrimination will, from an antisubordination perspective, get it exactly backward. On the one hand, this jurisprudence invalidates affirmative action programs seeking to aid historically subordinated groups.<sup>145</sup> On the other hand, it upholds

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<sup>139</sup> *Id.* at 212–13.

<sup>140</sup> *Id.* at 222.

<sup>141</sup> *Id.* at 224.

<sup>142</sup> Dahlia Lithwick, *Justice Grover Versus Justice Oscar*, SLATE (Dec. 6, 2006), <http://www.slate.com/id/2154993> (quoting remarks of Justice Scalia) (internal quotation marks omitted).

<sup>143</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1141–42 (1997).

<sup>144</sup> *Id.* at 1135–36.

<sup>145</sup> The Court embraced this formalistic principle in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In that case, the Court stood behind the principle of “consistency” — the idea

second-generation discrimination that continues to subordinate those groups.<sup>146</sup>

Of course, the *Davis / Arlington Heights / Feeney* framework left room for Congress to enact civil rights legislation to protect historically subordinated groups from adverse state action. But the Court had something to say here as well.

### *C. Judicial Limitations on Congressional Powers Under Section 5*

The Equal Protection Clause,<sup>147</sup> the Due Process Clause,<sup>148</sup> and the Privileges or Immunities Clause<sup>149</sup> are located in Section 1 of the Fourteenth Amendment. These provisions are self-executing, meaning that if a litigant wishes to sue the state for violating rights guaranteed by these clauses, she need not await additional congressional authorization. The Amendment does, however, acknowledge a special role for Congress with respect to the rights therein enumerated. Section 5 of

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that strict scrutiny would apply to all facial race-based classifications, whether those classifications sought to help historically subordinated groups or to hurt them. *Id.* at 224. Writing for the majority, Justice O'Connor defended this principle by saying that such scrutiny was necessary precisely to distinguish between "legitimate" and "illegitimate" forms of discrimination. *Id.* at 228. The implication of this analysis was that some forms of facial discrimination must be "legitimate," and thus capable of surviving strict scrutiny. So Justice O'Connor made clear that she disavowed the principle that strict scrutiny was "strict in theory but fatal in fact." *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)) (internal quotation marks omitted). In fairness, Justice O'Connor, writing again for the Court, made this more than an empty promise in the landmark case of *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld a law school's racially conscious admissions program under strict scrutiny. Nonetheless, strict scrutiny has remained extraordinarily stringent. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (invalidating a racially conscious, locally initiated school integration program under strict scrutiny); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating a public university's racially conscious admissions program under strict scrutiny).

<sup>146</sup> A dramatic instance is *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994). This case concerned a Federal Sentencing Guideline that provided the same penalty for a given amount of crack cocaine and 100 times that amount of powder cocaine. *Id.* at 710 & n.1. The court noted that nationally, over ninety percent of defendants convicted of crack cocaine possession were African American, while the statistics were largely reversed for powder cocaine. *Id.* at 711. The Federal Sentencing Guidelines therefore had a devastatingly disparate impact on African Americans. However, in analyzing this discrepancy, the court of appeals correctly determined that there was no facial discrimination on the basis of race. It therefore filtered the Sentencing Guideline through the *Davis / Arlington Heights / Feeney* framework. The court concluded that while Congress had known of the disparate impact of the Guideline, Congress enacted it not because of, but in spite of, this disparate impact on African Americans, and therefore upheld the Guideline. *Id.* at 712-14.

<sup>147</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>148</sup> *Id.* ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

<sup>149</sup> *Id.* ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

the Fourteenth Amendment gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.”<sup>150</sup> The question is how broadly Congress can legislate in the name of “enforcing” the other provisions of the Fourteenth Amendment.

In the 1960s, the Court interpreted Congress’s powers under the Reconstruction Amendments broadly.<sup>151</sup> In the key 1966 case of *Katzenbach v. Morgan*,<sup>152</sup> the Court considered the constitutionality of section 4(e) of the Voting Rights Act of 1965.<sup>153</sup> This federal legislation prohibited states from denying a person the franchise based on a literacy test if that person had “successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.”<sup>154</sup> Registered voters in New York brought suit, contending that this legislation exceeded Congress’s powers under Section 5 of the Fourteenth Amendment.<sup>155</sup> They claimed, correctly, that the Court had already upheld literacy tests as consistent with Section 1 of the Fourteenth Amendment.<sup>156</sup> Accordingly, they contended that Congress could therefore not “enforce” the Fourteenth Amendment through legislation that permitted individuals to bypass such literacy tests.<sup>157</sup>

In upholding the congressional provision, the *Katzenbach* Court made two distinct moves, either of which would have been sufficient to validate the contested provision. First, the Court observed that Congress might be able to “enforce” its *own* understanding of section 1 rather than the Court’s: “[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.”<sup>158</sup> Second, it observed that even when Congress was enforcing a judicial understanding of section 1, Congress had “the same broad powers expressed in the Necessary and Proper Clause,”<sup>159</sup> as interpreted in *McCulloch v. Maryland*.<sup>160</sup> The invocation of *McCulloch*’s generous reading of the

<sup>150</sup> U.S. CONST. amend. XIV, § 5.

<sup>151</sup> See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003).

<sup>152</sup> 384 U.S. 641 (1966).

<sup>153</sup> Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e) (2006)).

<sup>154</sup> *Id.* § 4(e)(2), 79 Stat. at 439.

<sup>155</sup> *Katzenbach*, 384 U.S. at 648.

<sup>156</sup> See *id.* at 649 (noting that *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), upheld a North Carolina English literacy requirement against an equal protection challenge).

<sup>157</sup> *Id.* at 648.

<sup>158</sup> *Id.* at 656.

<sup>159</sup> *Id.* at 650 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

<sup>160</sup> 17 U.S. (4 Wheat.) 316.

“necessary and proper” formulation as a gloss on section 5’s phrase “appropriate legislation” was a warrant for broad interpretations of congressional power.<sup>161</sup>

During the period from 1937 to 1995, Congress’s powers under section 5 did not require elaboration, as Congress had effectively plenary power under the Commerce Clause.<sup>162</sup> When Congress doubted whether it could enact legislation under section 5, it turned to the commerce power, as it did when enacting the Civil Rights Act of 1964. The Court had struck down the Civil Rights Act of 1875<sup>163</sup> in the 1883 *Civil Rights Cases*,<sup>164</sup> arguing that section 5 did not permit Congress to regulate private actors.<sup>165</sup> In 1964, Congress sought to pass a civil rights act that contained provisions similar to those invalidated by the *Civil Rights Cases*. Deeming it risky to predicate this legislation on section 5, Congress decided to ground Title II of the Act (which prohibited discrimination in public accommodations) primarily on its power to regulate interstate commerce.<sup>166</sup> In *Katzenbach v. McClung*<sup>167</sup> and *Heart of Atlanta Motel, Inc. v. United States*,<sup>168</sup> the Court vindicated that choice. It upheld Title II of the Civil Rights Act, even when it regulated private entities, on the ground that those entities were engaged in interstate commerce.<sup>169</sup>

The Rehnquist revolution of the 1990s ended this halcyon period for Congress. In 1995, the Court famously rolled back Congress’s commerce power in *United States v. Lopez*.<sup>170</sup> It also held in a series of controversial cases that even if Congress could enact legislation under the Commerce Clause, it could not use that power to pierce a sovereign immunity defense erected by a state in a suit for damages.<sup>171</sup> The ebbing tide of Congress’s power left civil rights legislation vulnerable both at the level of enactment and at the level of enforcement against the states. Progressives turned back to section 5, hoping Con-

<sup>161</sup> See *id.* at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

<sup>162</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

<sup>163</sup> Ch. 114, 18 Stat. 335.

<sup>164</sup> 109 U.S. 3 (1883).

<sup>165</sup> *Id.* at 11–13.

<sup>166</sup> See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 560 (5th ed. 2006) (“In the end, Congress chose to place primary emphasis on the Interstate Commerce Clause in enacting Title II of the Civil Rights Act of 1964, which prohibited discrimination and segregation in various places of ‘public accommodation’ . . .” (quoting 42 U.S.C. § 2000a (2006))).

<sup>167</sup> 379 U.S. 294 (1964).

<sup>168</sup> 379 U.S. 241 (1964).

<sup>169</sup> See *Katzenbach*, 379 U.S. at 304; *Heart of Atlanta Motel*, 379 U.S. at 261–62.

<sup>170</sup> 514 U.S. 549 (1995).

<sup>171</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).



gress could still rely on the Court's expansive interpretation of that provision in *Katzenbach v. Morgan*.

Yet what made the Rehnquist states' rights "revolution" worthy of the name was that it diminished congressional power on more than one front. In the 1997 case of *City of Boerne v. Flores*,<sup>172</sup> the Court also constricted Congress's powers under section 5. The *Boerne* Court first flatly rejected the model under which Congress could enforce its own understandings of section 1: it clarified that Congress could enforce only judicial interpretations of section 1.<sup>173</sup> Furthermore, the *Boerne* Court required that congressional legislation exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>174</sup>

The Court's replacement of *Katzenbach*'s "necessary and proper" standard with *Boerne*'s "congruent and proportional" standard may not seem a significant restriction of congressional power. Indeed, to a layperson, the phrase "congruent and proportional" might seem to provide Congress with *more* scope to act than the phrase "necessary and proper." Yet in rejecting the "necessary and proper" formulation, the Court was not rejecting the dictionary definitions of the words so much as the gloss *McCulloch* had placed on them.<sup>175</sup> In *McCulloch*, the Court superintended a *battle royale* over whether the term "necessary" meant "indispensable" or merely "convenient."<sup>176</sup> Chief Justice Marshall's decision that "necessary" often meant "no more than that one thing is convenient" was an aegis-creating move for Congress.<sup>177</sup> In depriving Congress of the "necessary and proper" formulation that *Katzenbach* conferred on it, the *Boerne* Court stripped away that shield in the section 5 context.

*Boerne* spawned a series of cases that invalidated or limited the application of civil rights statutes, including the Violence Against

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<sup>172</sup> 521 U.S. 507 (1997).

<sup>173</sup> *Id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.' Under this approach, it is difficult to conceive of a principle that would limit congressional power." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>174</sup> *Id.* at 520.

<sup>175</sup> It bears mention that "necessary and proper" has been used as a term of art suggesting a broad grant of authority in other contexts. For instance, Congress's Authorization for the Use of Military Force, enacted one week after the terrorist attacks on September 11, 2001, permitted the President to use "necessary and appropriate" force to bring the terrorists to justice. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

<sup>176</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

<sup>177</sup> *Id.*

Women Act,<sup>178</sup> the Age Discrimination in Employment Act,<sup>179</sup> and the Americans with Disabilities Act.<sup>180</sup> Of these cases, the last — *Board of Trustees of the University of Alabama v. Garrett*<sup>181</sup> — is the most significant. This case not only applied the *Boerne* standard, but also made it more difficult to meet.

The *Garrett* Court added two evidentiary requirements to the basic inquiry set forth in *Boerne*. First, the *Garrett* Court required that the scope of the constitutional right in question be identified “with some precision.”<sup>182</sup> Second, it required that Congress produce evidence that this constitutional right had been systematically violated.<sup>183</sup> In the case of Title I of the Americans with Disabilities Act, this standard meant Congress needed to have “identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.”<sup>184</sup> These evidentiary requirements further conscribed the civil rights legislation Congress could pass under section 5.

These restrictions on Congress’s section 5 powers bode ill even for the most canonical pieces of federal civil rights legislation. I have already observed that the Supreme Court interpreted the Civil Rights Act of 1964 to permit plaintiffs to bring disparate impact claims, even absent evidence of discriminatory intent.<sup>185</sup> When *Davis* declined to permit disparate impact, standing alone, to raise the burden of justification required from the state, the constitutional and statutory regimes tacked apart. Disparate impact on a protected group, in and of itself, did not trigger any heightened burden of justification by the state under the constitutional equal protection rubric. It did, however, trigger a heightened burden of justification by an employer under the congressional antidiscrimination rubric.

As the Court continues to rein in congressional power, the question arises whether this discrepancy between constitutional and statutory standards might be made consistent in favor of the constitutional rule. Because it regulates the employment relationship, Title VII will almost certainly remain valid at the level of enactment under the Commerce

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<sup>178</sup> Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.); see *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress could not enact the Violence Against Women Act under its section 5 power).

<sup>179</sup> 29 U.S.C. §§ 621–634 (2006); see *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that Congress could not enact the Age Discrimination in Employment Act under its section 5 power).

<sup>180</sup> 42 U.S.C. §§ 12101–12213 (2006); see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress could not enact the Americans with Disabilities Act under its section 5 power).

<sup>181</sup> 531 U.S. 356.

<sup>182</sup> *Id.* at 365.

<sup>183</sup> *Id.* at 373–74.

<sup>184</sup> *Id.* at 368.

<sup>185</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *supra* note 109 and accompanying text.

Clause. However, *Boerne* and *Garrett* call into question whether a disparate impact claim might become unavailable to plaintiffs suing states for damages, as Congress cannot abrogate state sovereign immunity with its commerce power.<sup>186</sup> In a recent case involving public employment, Justice Scalia hinted that the disparate impact provisions of Title VII might not find adequate ground in Congress's section 5 power.<sup>187</sup>

The Court's attempts to limit Congress's group-based civil rights legislation were, once again, justified with reference to pluralism anxiety. In his majority opinion in *Garrett*, Chief Justice Rehnquist made much of the fact that classifications based on disability drew only rational basis review under Section 1 of the Fourteenth Amendment.<sup>188</sup> In his view, this meant Congress's power to legislate with respect to disability was concomitantly constrained.<sup>189</sup> He cited the entirety of Justice White's passage from *Cleburne*, describing it as "quite prescient."<sup>190</sup> Like Chief Justice Rehnquist, I think it worth re-  
prising the language:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>191</sup>

Of course, the prescience Chief Justice Rehnquist lauded was his own. It was then-Justice Rehnquist who made the "too many groups" point in his 1973 *Sugarman* dissent,<sup>192</sup> years before it was picked up by Justice White in *Cleburne*.<sup>193</sup>

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<sup>186</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>187</sup> See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681–82 (2009) (Scalia, J., concurring) ("I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

<sup>188</sup> *Garrett*, 531 U.S. at 366–67.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 366.

<sup>191</sup> *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445–46 (1985)) (internal quotation marks omitted).

<sup>192</sup> *Sugarman v. Dougall*, 413 U.S. 634, 656–57 (1973) (Rehnquist, J., dissenting).

<sup>193</sup> See *supra* pp. 758–59.

*D. The End of Constitutional Civil Rights?*

The Court has, then, closed three separate doors through which it had permitted the advancement of group-based civil rights under the Equal Protection Clause. In each line of jurisprudence, it has alluded to pluralism anxiety. For the purpose of precision, I should observe that two different types of pluralism anxiety are in play here — an anxiety about the proliferation of classifications (such as adding classifications based on disability or sexual orientation to the canon of classifications accorded formal heightened scrutiny) and an anxiety about proliferation of classes within classifications (such as the proliferation of religious groups within the already protected classification of “religion”). The two forms of anxiety have different doctrinal effects. The first anxiety attends the Court’s heightened scrutiny jurisprudence and its section 5 jurisprudence because it highlights the absence of a principled way to add new classifications to those already protected. The second anxiety does not relate to the heightened scrutiny jurisprudence or the section 5 jurisprudence, because religion and race will remain protected classifications no matter how many religions and races are recognized. However, the second anxiety will attach to the disparate impact jurisprudence. We can understand *Smith*, for instance, as the Court’s recognition that there are too many religious groups in the United States to permit the accommodation of each, despite the fact that the Court would never argue that “free exercise” of religion was not protected under the current Constitution. While I distinguish between these two forms of pluralism anxiety for the sake of clarity, both cut in the same direction: they operate to curtail the equal protection jurisprudence.

It also bears note that the Court appears to be concerned not only with the general proliferation of groups, but also, like Putnam, with the effect such proliferation has on social capital. While many of the Court’s statements about closing down traditional equal protection speak primarily of “too many groups” without making Putnam’s link between “too many groups” and a decline in social capital, other statements by the Court close the gap. Perhaps the most explicit link occurs in the *Smith* decision, where the Court underscores that exempting religious practices from laws of general applicability would permit every citizen “to become a law unto himself.”<sup>194</sup> In such a society, the Court continues, individuals would be able to claim religious exemptions from civic obligations such as “the payment of taxes,” “health and safety regulation such as manslaughter and child neglect laws,” “compulsory vaccination laws,” “traffic laws,” and “environmen-

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<sup>194</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)) (internal quotation marks omitted).

tal protection laws.”<sup>195</sup> To be sure, the enumerated laws produce compelled forms of social capital rather than the voluntary forms of social capital Putnam describes. But the gist of the Court’s concern is that an overly robust free exercise claim would destroy such forms of social cohesion.

The concern of atomization has also been explicitly expressed in the context of race, ethnicity, and national origin.<sup>196</sup> While these direct expressions have not been made in majority opinions, some evidence suggests a current majority of the Court might favor the sentiment they convey.<sup>197</sup> Even in precedents holding that racial diversity was a compelling governmental interest, the Court has insisted on at least minimizing the salience of race or national origin.<sup>198</sup>

Further evidence that the Court is concerned not only about the institutional issue of adjudicative line-drawing, but also about line-drawing more generally in this context, can be seen in the restrictions the Court has placed on Congress. If the Court were concerned about only the line-drawing problems that are endemic to adjudication, we would not expect it to express that concern with respect to the legisla-

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<sup>195</sup> *Id.* at 889.

<sup>196</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“In the eyes of government, we are just one race here. It is American.”); *Batson v. Kentucky*, 476 U.S. 79, 129 (1986) (Burger, C.J., dissenting) (“A further painful paradox of the Court’s holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a ‘melting pot.’”); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 186–87 (1977) (Burger, C.J., dissenting) (“It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter’s interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York, and endorsed by the Court today, moves us one step farther away from a truly homogeneous society. This retreat from the ideal of the American ‘melting pot’ is curiously out of step with recent political history — and indeed with what the Court has said and done for more than a decade.”).

<sup>197</sup> *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>198</sup> In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld a public law school’s race-based affirmative action program on the ground that racial diversity was a compelling governmental interest to which the program was narrowly tailored. However, in the case of *Gratz v. Bollinger*, 539 U.S. 244 (2003), handed down the same day, the Court struck down the same university’s undergraduate race-based affirmative action program on the ground that it was insufficiently tailored to the same interest. The *Gratz* Court cited back to the seminal opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which suggested that race-based affirmative action was acceptable if race was considered alongside “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” *Id.* at 317 (opinion of Powell, J.). The *Gratz* Court observed that the undergraduate admissions policy allowed race to figure too largely in the admissions consideration, thereby distinguishing the policy from both the actual policy in *Grutter* and the hypothesized policy in *Bakke*. See *Gratz*, 539 U.S. at 275.

tive context. However, the Court's decisions in *Boerne* and its progeny ensure that Congress will also be constrained in its capacity to expand group-based civil rights under section 5.

The future of constitutional civil rights, then, seems grim. The Court not only has conscribed the old model of equal protection, but also has articulated a forceful reason for doing so. While the judiciary has always been leery of appearing to play favorites among groups, that anxiety has swelled in proportion to the nation's pluralism anxiety. As "equality" has become increasingly associated with pluralism anxiety, progressives are losing the capacity to conjure support with that word. We must ask whether we are witnessing the end of constitutional civil rights in this country.<sup>199</sup>

### III. THE MOVE TOWARD LIBERTY-BASED DIGNITY

This assessment seems premature. The Court has used liberty analysis to mitigate its curtailment of group-based equality analysis. This movement toward liberty has not secured all the ends that would have been available under an extension of the traditional group-based equal protection analysis. Nonetheless, progressives should pay more heed to this move toward liberty. The liberty-based dignity claim has been the Court's way of splitting the difference between a direct extension of equality analysis and its absolute foreclosure.

Put differently, the Court appears to have come on its own initiative to the same descriptive and normative conclusions as Putnam. The Court seems to understand pluralism as a challenge to a progressive agenda. At the same time, it has seen that challenge as one that can be overcome by using liberty analysis, which draws on a broader, more inclusive form of "we." Specifically, even as the Court has closed the three equality doors described above, it has opened three corresponding liberty doors.

#### A. *The Liberty-Based Dignity Claim as an End Run Around Bars on Heightened Scrutiny*

In the 2003 case of *Lawrence v. Texas*,<sup>200</sup> the Supreme Court considered the constitutionality of a Texas statute that criminalized same-sex sodomy. In its grant of certiorari, the Court agreed to consider whether the statute violated either the Equal Protection Clause or the

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<sup>199</sup> See generally Jed Rubenfeld, Essay, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (positing that one unifying theory of the Supreme Court decisions of the time was a consistent opposition to extending constitutionally grounded antidiscrimination law).

<sup>200</sup> 539 U.S. 558 (2003).

Due Process Clause of the Fourteenth Amendment.<sup>201</sup> Individuals on both sides of the issue believed the Court would invalidate the statute and would tarry only over the ground of invalidation.<sup>202</sup>

Precedent suggested the Court would take the equality route. To take the liberty route would require overruling *Bowers v. Hardwick*,<sup>203</sup> the 1986 case in which the Court upheld a Georgia sodomy statute against a due process liberty challenge. Striking down the statute on equal protection grounds, in contrast, would permit the Court to avoid an admission of error. In addition, unlike the Georgia sodomy statute at issue in *Bowers*, the Texas sodomy statute was sex-specific, prohibiting same-sex, but not different-sex sodomy.<sup>204</sup> The traditional equal protection argument was therefore plainly available.

In a majority opinion written by Justice Kennedy, however, the *Lawrence* Court struck down the sodomy statute on liberty grounds. The Court found the equal protection challenge to be “tenable.”<sup>205</sup> Yet it contended that the better course was to find that the statute violated the fundamental right of all persons — straight, gay, or otherwise — to control their intimate sexual relations.<sup>206</sup> Along the way, the Court explicitly overruled *Bowers*.<sup>207</sup>

The Court’s decision to take what many saw as the more arduous path requires explanation. Prior to *Lawrence*, the Court’s major equal protection decision with respect to sexual orientation was the 1996 decision in *Romer v. Evans*.<sup>208</sup> In *Romer*, the Supreme Court struck down a state constitutional amendment (known as Amendment 2) that denied protection to gays, lesbians, and bisexuals.<sup>209</sup> The Court did not assign a level of scrutiny to state classifications relating to sexual orientation, asserting that Amendment 2 violated equal protection “in

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<sup>201</sup> *Lawrence v. Texas*, 537 U.S. 1044 (2002); Petition for a Writ of Certiorari at i, *Lawrence*, 539 U.S. 558 (No. 02-102), 2002 WL 32101039, at \*i.

<sup>202</sup> See, e.g., Linda Greenhouse, *Libertarians Join Liberals in Challenging Sodomy Law*, N.Y. TIMES, Mar. 19, 2003, at A23 (“The United States Supreme Court’s decision to take the case has been interpreted on both sides as an indication that the court is likely to rule against the state.”).

<sup>203</sup> 478 U.S. 186 (1986).

<sup>204</sup> Compare TEX. PENAL CODE ANN. § 21.06(a) (West 2003) (providing that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of *the same sex*” (emphasis added)), with GA. CODE ANN. § 16-6-2(a)(1) (West 2009) (providing that “[a] person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”). The Texas statute was invalidated by *Lawrence*. The Georgia statute was upheld by the United States Supreme Court in *Bowers*, but was subsequently invalidated by the Georgia Supreme Court in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

<sup>205</sup> *Lawrence*, 539 U.S. at 574.

<sup>206</sup> *Id.* at 578–79.

<sup>207</sup> *Id.* at 578.

<sup>208</sup> 517 U.S. 620 (1996).

<sup>209</sup> *Id.* at 624, 635–36.

the most literal sense.”<sup>210</sup> *Romer* has been read as a “rational basis with bite” case.<sup>211</sup> At the same time, however, the Court emphasized that *Romer* might be a ticket good only for one day. It cited the magnitude of the harm effectuated by the state amendment as “unprecedented in our jurisprudence.”<sup>212</sup> Taking this cue, subsequent decisions by lower courts have consistently distinguished *Romer* on the basis of the distinctive breadth of the harm inflicted by Amendment 2.<sup>213</sup>

If the *Lawrence* Court had struck down the Texas sodomy statute on the basis of *Romer*, it would have had to clarify the nature of the scrutiny drawn by orientation-based classifications, an issue it had arguably left deliberately opaque in *Romer*.<sup>214</sup> For the reasons stated in *Cleburne*, the Court was unlikely to grant classifications based on sexual orientation heightened scrutiny. But if such classifications were formally given rational basis with bite review, the Court would have been under significant pressure to articulate exactly what the standard required. Such an articulation could raise the same problems as a heightened scrutiny analysis, given that the Court would have to distinguish classifications based on sexual orientation from other classifications that received only ordinary rational basis review.

By deciding *Lawrence* on liberty grounds, the Court quieted pluralism anxiety. The Court evaded the charge that it was picking and choosing among groups by highlighting that the right in question belonged to all persons within the United States.<sup>215</sup> *Lawrence* was ultimately not a group-based equality case about gays, but rather a universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes.

To be sure, this tide raised some boats more than others. Four of the thirteen sodomy statutes on the books at the time *Lawrence* was litigated applied only to same-sex sodomy, and the remainder were rarely if ever enforced.<sup>216</sup> Indeed, the Georgia Assistant Attorney General who successfully defended his state’s sex-neutral sodomy statute in *Bowers* conceded in oral argument that the statute would be unconstitutional if applied to married heterosexuals.<sup>217</sup> In finding all

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<sup>210</sup> *Id.* at 633.

<sup>211</sup> Smith, *supra* note 83, at 2770 (internal quotation marks omitted).

<sup>212</sup> *Romer*, 517 U.S. at 633.

<sup>213</sup> See cases cited *supra* note 99.

<sup>214</sup> See Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 450–52 (1997) (noting that the *Romer* Court may have been deliberately elliptical to hold open future possibilities about the evolution of equal protection jurisprudence in this area).

<sup>215</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”).

<sup>216</sup> *Id.* at 573.

<sup>217</sup> Transcript of Oral Argument at 5–6, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1986 U.S. Trans. LEXIS 74, at \*5–6.



thirteen sodomy statutes unconstitutional, *Lawrence* clearly helped gay people more than it helped straight people.<sup>218</sup> In this sense, *Lawrence* was not a simple liberty case, but one with undertones of equality.<sup>219</sup> Indeed, *Lawrence* arguably more resoundingly endorses the equality of gay and straight individuals than does *Romer*, which may explain why one circuit court relied more on *Lawrence* than on *Romer* in sustaining due process challenges to the federal “Don’t Ask, Don’t Tell” policy.<sup>220</sup>

Justice Kennedy’s opinion in *Lawrence* clearly recognized the right at issue as having this hybrid structure: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>221</sup> The majority opinion also repeatedly referred to the right at issue as one pertaining to individual “dignity.”<sup>222</sup> It is no accident, then, that Tribe used this case as his starting point to discuss the “double helix” of liberty and equality as a dignity-based claim. In my terms, *Lawrence* formulated a liberty-based dignity claim.

The *Lawrence* Court also intimated that the liberty-based dignity claim could be asserted more often in the future. Prior to *Lawrence*, the traditional formulation of substantive due process rights required the liberties to be “deeply rooted in this Nation’s history and tradition”<sup>223</sup> and “implicit in the concept of ordered liberty.”<sup>224</sup> The *Bowers* Court rejected the substantive due process challenge to the Georgia statute based on this formulation. As Justice White famously wrote in that 1986 case, “to claim that a right to engage in [homosexual sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>225</sup>

<sup>218</sup> See *Lawrence*, 539 U.S. at 575 (arguing that *Bowers*’s “continuance as precedent demeans the lives of homosexual persons” (emphasis added)).

<sup>219</sup> Tribe, *supra* note 14, at 1898.

<sup>220</sup> See *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). More recently, a district court in the Ninth Circuit applied *Witt*’s reading of *Lawrence* to invalidate the “Don’t Ask, Don’t Tell” policy. *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP (EX), 2010 WL 3960791, at \*33 (C.D. Cal. Sept. 9, 2010). As noted above, lower courts have been more reluctant to read *Romer* broadly. See *supra* note 99 and accompanying text.

<sup>221</sup> *Lawrence*, 539 U.S. at 575.

<sup>222</sup> *E.g., id.* at 567 (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”); *id.* at 574 (discussing “personal dignity and autonomy” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.))).

<sup>223</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (internal quotation marks omitted)).

<sup>224</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted). For a discussion of Justice Kennedy’s several opinions linking equality and liberty under the loose rubric of dignity, see Siegel, *Dignity and the Politics of Protection*, *supra* note 14, at 1735–45.

<sup>225</sup> *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

Justice Kennedy's majority opinion in *Lawrence* not only rejected the holding of *Bowers*, but also its formulation of due process as well:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>226</sup>

Justice Kennedy read the level of generality at which the framers pitched the Due Process Clauses to signify that they intended to leave the content of the rights they guaranteed to the intelligence of successive generations.<sup>227</sup> In making the ingenious intentionalist argument that the Framers wished to free us of their specific intent, Justice Kennedy struck the chains of history from due process jurisprudence.<sup>228</sup>

The importance of this move in *Lawrence* is difficult to overstate.<sup>229</sup> Prior to *Lawrence*, history often operated as a significant constraint on the recognition of new due process rights. Even opinions that recognized such rights did so after paying obeisance at the altar of history, regardless of how impoverished that offering might be.<sup>230</sup> Interpreting these cases, Professor Cass Sunstein hypothesized that the due process jurisprudence was backward-looking, while the equal protection jurisprudence was forward-looking.<sup>231</sup> This conclusion was not entirely true even when Sunstein made the claim.<sup>232</sup> But we can

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<sup>226</sup> *Lawrence*, 539 U.S. at 578–79.

<sup>227</sup> *Id.*

<sup>228</sup> The cogency of Justice Kennedy's approach should not be underestimated. The Ninth Amendment, of course, provides a canon of construction consonant with Justice Kennedy's analysis in stating: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Similarly, we can read the wording of the Fourteenth Amendment itself to justify this broader construction. As Professor Stephen Carter argued long ago, the Constitution's "structural" provisions tend to be specific, while the document's "rights" provisions tend to be abstract. Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 830, 854 (1985).

<sup>229</sup> See Tribe, *supra* note 14, at 1899.

<sup>230</sup> The classic example here is *Roe v. Wade*, 410 U.S. 113 (1973), where Justice Blackmun's majority opinion engaged in an eighteen-page history of abortion that ranged from antiquity to modernity. See *id.* at 129–47. This analysis led to the conclusion that the proscriptions on abortion were less absolute than many thought. *Id.* at 129. Yet a goodly distance exists between saying bars on abortion were *not* deeply rooted in the nation's traditions and saying that the right to have an abortion was so rooted.

<sup>231</sup> See generally Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

<sup>232</sup> See Eskridge, *supra* note 14 (examining myriad cases decided before 1988, notably *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969); and *Buck v. Bell*, 274 U.S. 200 (1927)).

see why he might have believed it to be so. Under the *Glucksberg* formulation, a long history of discrimination against a group would count against its due process claim. Under the *Bowen v. Gilliard*<sup>233</sup> formulation, in contrast, a history of discrimination would count in favor of the group's equal protection claim because it would support its claim to protected status.<sup>234</sup> *Lawrence* cleared up this confusion. Liberty and equality became — or were revealed to be — horses that ran in tandem rather than in opposite directions.

*B. The Liberty-Based Dignity Claim as an End Run  
Around Bars on Disparate Impact*

Liberty-based dignity claims have also permitted the Court to evade the constraints of the *Davis* framework. The best instance can be found in the Court's abortion jurisprudence. Feminists have long argued that a woman's right to terminate a pregnancy should be analyzed as an equality issue.<sup>235</sup> The Court has constrained the extent to which abortion can be addressed under the equal protection guarantees. Nonetheless, by using liberty analysis, the Court has managed to vindicate the equality concerns of women despite the constraints imposed by the *Davis* framework.

Abortion rights raise at least two equal protection concerns. First, given that only women can become pregnant, it could be argued that "sex" for the purposes of equal protection doctrine should be defined to include "pregnancy." Congress has taken this approach in the employment context — the Pregnancy Discrimination Act of 1978<sup>236</sup> redefined "because of sex" in Title VII of the Civil Rights Act of 1964 to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."<sup>237</sup> Second, even if pregnancy is excluded from the definition of sex, the correlation between pregnant persons and women could be viewed to be strong enough to require the state to meet the higher burden of justification required when it makes facial sex-based distinctions.

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<sup>233</sup> 483 U.S. 587 (1987).

<sup>234</sup> See *id.* at 602 (enunciating a test for heightened scrutiny that inquires whether the group has been subjected to historical discrimination, is politically powerless, and is marked by "obvious, immutable, or distinguishing characteristics" (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986))).

<sup>235</sup> See, e.g., Ginsburg, *supra* note 14; Siegel, *Reasoning from the Body*, *supra* note 14; Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010) (elaborating on the claims, particularly sex equality claims, "animating feminist abortion rights claims in the years before *Roe v. Wade*," *id.* at 1875).

<sup>236</sup> Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2006)).

<sup>237</sup> 42 U.S.C. § 2000e(k).

The Court has rejected both arguments. In 1974, the Court held in *Geduldig v. Aiello*<sup>238</sup> that pregnancy discrimination is not sex discrimination.<sup>239</sup> *Geduldig* concerned California's disability insurance system, which did not cover disabilities arising from pregnancies.<sup>240</sup> Four women who had been pregnant brought suit, arguing this exclusion constituted sex discrimination that violated the Equal Protection Clause.<sup>241</sup> The Court disagreed. It observed that the challenged disability program distinguished between "pregnant women" and "non-pregnant persons."<sup>242</sup> It then noted that "[w]hile the first group is exclusively female, the second includes members of both sexes."<sup>243</sup> In terms that have elicited disbelieving and pained laughter from generations of my Constitutional Law students, the Court reasoned that pregnancy discrimination was not sex discrimination because the distinction between pregnant and nonpregnant persons did not map perfectly onto the distinction between women and men.<sup>244</sup>

The Court's analysis in *Geduldig* left open the issue of whether pregnancy discrimination might draw heightened scrutiny because pregnancy discrimination has a disparate impact on women. Two years after *Geduldig*, however, the Court decided *Washington v. Davis*.<sup>245</sup> As noted,<sup>246</sup> *Davis* stated that, in the absence of discriminatory intent, no amount of disparate impact on a protected group would draw heightened scrutiny. In the 1979 case of *Personnel Administrator v. Feeney*,<sup>247</sup> the Court not only applied the *Davis* framework to sex, but also articulated an extremely stringent definition of discriminatory intent.<sup>248</sup>

*Geduldig* and *Feeney* have become the Scylla and Charybdis for equal protection claims relating to abortion. The Court made this predicament clear in the 1993 case of *Bray v. Alexandria Women's*

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<sup>238</sup> 417 U.S. 484 (1974).

<sup>239</sup> *Id.* at 497.

<sup>240</sup> *Id.* at 488-89.

<sup>241</sup> *Id.* at 489-90.

<sup>242</sup> *Id.* at 497 n.20.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* Because *Geduldig* interpreted the Equal Protection Clause, Congress had no capacity to supersede this interpretation short of a constitutional amendment. Congress did have occasion, however, to express its disagreement with the Court's analysis a few years later. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court extended its reasoning in *Geduldig* to interpret Title VII of the Civil Rights Act of 1964. Because this decision was purely a matter of statutory interpretation, Congress had the option to supersede it. It did so with the aforementioned Pregnancy Discrimination Act of 1978, where it explicitly defined discrimination "on the basis of sex" to include discrimination "on the basis of pregnancy." 42 U.S.C. § 2000e(k) (2006).

<sup>245</sup> 426 U.S. 229 (1976).

<sup>246</sup> See *supra* pp. 763-64.

<sup>247</sup> 442 U.S. 256 (1979).

<sup>248</sup> See *supra* p. 764.

*Health Clinic*.<sup>249</sup> In that case, the Court rejected an abortion clinic's claim that antiabortion protestors had violated the Ku Klux Klan Act of 1871<sup>250</sup> by conspiring to deprive women seeking abortions of their right to interstate travel.<sup>251</sup> The Court reasoned that to prove a violation of the Act, the clinic would have to show that the protestors bore "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."<sup>252</sup> Justice Scalia's majority opinion rejected the clinic's argument that "since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class"<sup>253</sup> on the grounds that "[o]ur cases do not support that proposition."<sup>254</sup> The cases in question — dutifully adduced by the Court — were *Geduldig* and *Feeney*.<sup>255</sup>

The Court's refusal to analyze abortion as a women's equality issue does not mean it left the woman's right to choose completely unprotected, as evidenced by its due process decisions in *Roe v. Wade*<sup>256</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>257</sup> Moreover, like *Lawrence*, these liberty-based dignity decisions both underscored their equality dimensions. In 1973, the *Roe* Court noted that "[m]aternity, or additional offspring, may force upon *the woman* a distressful life and future."<sup>258</sup> Such statements led then-Justice Rehnquist to complain in dissent that the Court was importing "legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment."<sup>259</sup> When it revisited *Roe* in 1992, the *Casey* Court stood its ground, contending: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>260</sup> Liberty-based dignity has enabled the Court to provide some measure of protection for a woman's right to choose.

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<sup>249</sup> 506 U.S. 263 (1993).

<sup>250</sup> Ch. 22, 17 Stat. 13 (1871) (codified in scattered sections of the U.S. Code).

<sup>251</sup> *Bray*, 506 U.S. at 275–77.

<sup>252</sup> *Id.* at 268–69 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

<sup>253</sup> *Id.* at 271 (footnote omitted).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 410 U.S. 113 (1973).

<sup>257</sup> 505 U.S. 833 (1992).

<sup>258</sup> *Roe*, 410 U.S. at 153 (emphasis added).

<sup>259</sup> *Id.* at 173 (Rehnquist, J., dissenting).

<sup>260</sup> *Casey*, 505 U.S. at 856.

*C. The Liberty-Based Dignity Claim as an  
End Run Around Limitations on the Congressional Enforcement of  
Equal Protection Under Section 5*

Liberty-based dignity has also permitted the Court to loosen some restraints on Congress's section 5 powers. In the 2004 case of *Tennessee v. Lane*,<sup>261</sup> the Supreme Court considered whether Congress's section 5 power permitted it to enact Title II of the Americans with Disabilities Act, which protects the rights of individuals with disabilities to access public accommodations.<sup>262</sup> In *Lane*, two paraplegic individuals sued Tennessee, claiming "that they were denied access to, and the services of, the state court system by reason of their disabilities."<sup>263</sup> One of those individuals, George Lane, had to crawl up two flights of stairs in the courthouse to answer criminal charges against him.<sup>264</sup> When he sued Tennessee for violating Title II of the Americans with Disabilities Act, the State raised an Eleventh Amendment sovereign immunity defense.<sup>265</sup> Under the Supreme Court's jurisprudence, Congress may only pierce a state's sovereign immunity if it has "unequivocally expressed its intent to abrogate that immunity" and has "acted pursuant to a valid grant of constitutional authority."<sup>266</sup> The first requirement was clearly met.<sup>267</sup> The question was whether Congress had the power under Section 5 of the Fourteenth Amendment to enact Title II.

But which part of section 1 was Congress putatively enforcing — the Equal Protection Clause or the Due Process Clause? Like *Lawrence*, *Lane* could have been analyzed either as an equality case or as a liberty case. *Lane* was an equality case insofar as it related to individuals with disabilities. *Lane* was a liberty case insofar as it touched on the right of individuals to access the courts.

As in *Lawrence*, a precedent presented an obstacle to one avenue of analysis. This time the obstacle rested on the equality route. As noted,<sup>268</sup> the Court had determined in *Garrett* that Congress did not have the power to enact Title I of the Americans with Disabilities Act under its section 5 power.<sup>269</sup> The failure of classifications targeting in-

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<sup>261</sup> 541 U.S. 509 (2004).

<sup>262</sup> *Id.* at 513.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 513–14.

<sup>265</sup> *Id.* at 514.

<sup>266</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

<sup>267</sup> *Lane*, 541 U.S. at 518.

<sup>268</sup> *See supra* pp. 771–72.

<sup>269</sup> *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) ("[T]o uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*. Section 5 does not so broadly enlarge congressional authority." (footnote omitted)).

dividuals with disabilities to garner heightened scrutiny in *Cleburne* appeared to be fatal to the claim in *Garrett*. Moreover, *Garrett*, unlike *Bowers*, was a precedent that had been decided less than five years before *Lane*. It was clear that if the Court were to grant Lane relief, it would be on liberty grounds.

It was. Writing for the Court, Justice Stevens pointed out that *Garrett* was distinguishable because in that case Congress sought to enforce the Equal Protection Clause.<sup>270</sup> In *Lane*, he stated, Congress was relying on its power to enforce the Due Process Clause.<sup>271</sup> The Court rightly found that the liberty in question — the right to access the courts — had already been well established.<sup>272</sup> The remaining issue was whether congressional legislation mandating that individuals with disabilities have access to the courts was congruent and proportional to violations of that right. The Court determined that there was a record of such violations<sup>273</sup> sufficient to make Title II of the Americans with Disabilities Act a “congruent and proportional” response to those violations.<sup>274</sup>

#### *D. The Shift Toward Liberty Belies a Simple Anti-Antidiscrimination Agenda*

These three opening liberty doors help eliminate the major alternative hypothesis to pluralism anxiety for why the Court has closed the three equality doors — namely, that the Court has simply become more conservative. Since the end of the Warren Court era (1953–1969), the Court has undoubtedly moved significantly to the right, with the Burger Court (1969–1986), the Rehnquist Court (1986–2005), and the Roberts Court (2005–present).<sup>275</sup> This rightward shift has cer-

<sup>270</sup> *Lane*, 541 U.S. at 521–22.

<sup>271</sup> *Id.* at 522–23.

<sup>272</sup> As the *Lane* Court observed:

These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the “right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.” *Faretta v. California*, 422 U.S. 806, 819[ &] n.15 (1975). The Due Process Clause also requires the States to afford certain civil litigants a “meaningful opportunity to be heard” by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

*Id.* at 523.

<sup>273</sup> *Id.* at 524–29.

<sup>274</sup> *Id.* at 530–34.

<sup>275</sup> The Supreme Court reporter for the *New York Times* recently described the Roberts Court as more conservative than its predecessors. Adam Liptak, *The Roberts Court: The Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1. Liptak bases this conclusion “on an analysis of four sets of political science data.” *Id.* These data sets code decisions as either “conservative”

tainly played some role in contributing to the foreclosure of traditional equality-based claims. Yet the three opening doors in the liberty context belie the idea that the Court has been driven only by its increasing conservatism. If the Court were motivated simply by its increasing conservatism, one would expect a more decisive foreclosure of all constitutional civil rights claims.

One lucid statement of this alternative hypothesis is Professor Jed Rubenfeld's 2002 argument that the Court has been motivated by an "anti-antidiscrimination" agenda.<sup>276</sup> In an "exploratory vein,"<sup>277</sup> he suggests that various Supreme Court cases decided from "about 1995"<sup>278</sup> can be better explained by an animus toward the antidiscrimination agenda than by their own doctrinal rationales.<sup>279</sup> His examples include post-*Boerne* cases such as *Garrett*, the freedom of association case of *Boy Scouts of America v. Dale*,<sup>280</sup> and the affirmative action case of *Adarand Constructors, Inc. v. Peña*.<sup>281</sup> He urges us to look outside of the silos created by doctrines to identify broad patterns across them.<sup>282</sup> One such pattern, he contends, is the anti-antidiscrimination agenda. Under this agenda, the Justices seek to protect themselves against perceived threats to "fundamental American values and freedoms" such as "the erosion of meritocracy, the creation of a sense of entitlement among undeserving people, the insistence that homosexuality be protected instead of condemned, the fomenting of a victimization culture, and so on."<sup>283</sup> In other words, the shift toward a more conservative Court has resulted in a substantive antipathy to many — if not *all* — constitutional civil rights claims.

When we look at the panoply of "rights" cases that the Court has decided in recent decades, however, pluralism anxiety seems to offer a better explanation of the jurisprudence as a whole. Cases like *Lawrence*, *Casey*, and *Lane* are hard to square with a general anti-antidiscrimination agenda. (In fairness to Rubenfeld, some of the cases predate his 1995 starting point, and others were decided after he published his article.)

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(as in decisions favoring prosecutors or employers) or "liberal" (as in decisions favoring criminal defendants and plaintiffs claiming discrimination). *Id.* Under such coding, the Warren Court issued "conservative" opinions 34% of the time. *Id.* The Rehnquist and Burger Courts issued "conservative" opinions 55% of the time. *Id.* In its first five years, the Roberts Court has issued "conservative" opinions 58% of the time. *Id.*

<sup>276</sup> Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

<sup>277</sup> *Id.* at 1142.

<sup>278</sup> *Id.* at 1141.

<sup>279</sup> *Id.* at 1142.

<sup>280</sup> 530 U.S. 640 (2000).

<sup>281</sup> 515 U.S. 200 (1995).

<sup>282</sup> See Rubenfeld, *supra* note 276, at 1142.

<sup>283</sup> *Id.*



Indeed, in some cases a liberty-based intervention by the Court will be more aggressive than an equality-based one. As Justice Jackson observed long ago, a judicially enforced equality norm generally allows the state broader latitude to respond than does a judicially enforced liberty norm.<sup>284</sup> Specifically, the equality norm allows the state to “level down” (ensuring equality by depriving all of the entitlement) as well as to “level up” (ensuring equality by according all the entitlement). If a city wishes to close down all its swimming pools (leveling down) rather than to allow integration (leveling up), this is, at least under existing precedents, consistent with the equal protection guarantee.<sup>285</sup> In contrast, the liberty norm generally does not allow the state actor to “level down.”<sup>286</sup>

We will be in a better position to arbitrate between the two theories on the cause for the foreclosure of many traditional rights claims — the anti-antidiscrimination agenda versus pluralism anxiety — when we again have a progressive Supreme Court. While the political orientation of the Court will be cyclical, the pluralism of the country will only increase. For now, however, the evidence seems to support the proposition that equality norms have not been evicted from constitutional jurisprudence altogether, but have rather been relocated to collateral areas of doctrine.

#### IV. HISTORICAL ANTECEDENTS OF LIBERTY-BASED DIGNITY CLAIMS

Using liberty analysis to vindicate equality claims can be characterized as an innovative response to pluralism anxiety. However, when placed in historical context, this strategy has many doctrinal antecedents, including the protection of rights under the Due Process and Equal Protection Clauses, and even the Eighth Amendment’s bar on cruel and unusual punishments. What is “new” about the liberty-based dignity claim is only the increasing pressure on the Court to rely on it.

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<sup>284</sup> See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government — state, municipal and federal — from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.”).

<sup>285</sup> See *Palmer v. Thompson*, 403 U.S. 217 (1971).

<sup>286</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

*A. Substantive Due Process Antecedents*

Many canonical substantive due process cases are inflected with equality concerns. In the 1917 case of *Buchanan v. Warley*,<sup>287</sup> the Court struck down a statute that barred a property owner from conveying his property to an individual of another race.<sup>288</sup> While the case turned on the due process guarantee, its racial equality inflections were patent throughout. For instance, the Court stated: “Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color.”<sup>289</sup> The Court went on to acknowledge the existence of “a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration.”<sup>290</sup> However, the Court stated that the “solution cannot be promoted by depriving citizens of their constitutional rights and privileges.”<sup>291</sup>

In a pair of cases decided in the 1920s, the Court protected the right of parents to control the education of their children. These cases — *Meyer v. Nebraska*<sup>292</sup> and *Pierce v. Society of Sisters*<sup>293</sup> — are viewed to be the source of noneconomic substantive due process rights during the *Lochner* era. Neither case directly invoked the Equal Protection Clause. Yet the *Meyer* Court was clearly concerned about the persecution of ethnic minorities — specifically Germans after World War I. It noted that while the state statute at issue in the case prohibited students from learning German, it did not prohibit them from learning ancient languages such as Latin.<sup>294</sup> Similarly, the *Pierce* Court, which struck down an Oregon statute that precluded students from attending parochial schools, was not solely concerned with parental choice, but also was specifically concerned with the right of parents to choose schools “where their children will receive appropriate . . . religious training.”<sup>295</sup> Certainly, by the end of the *Lochner* period, these cases were understood to have equality dimensions. Footnote four of *United States v. Carolene Products Co.* cites *Meyer* as

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<sup>287</sup> 245 U.S. 60 (1917).

<sup>288</sup> *Id.* at 82.

<sup>289</sup> *Id.* at 78–79 (citation omitted).

<sup>290</sup> *Id.* at 80.

<sup>291</sup> *Id.* at 80–81.

<sup>292</sup> 262 U.S. 390 (1923).

<sup>293</sup> 268 U.S. 510 (1925).

<sup>294</sup> *Meyer*, 262 U.S. at 400–01.

<sup>295</sup> *Pierce*, 268 U.S. at 532.

involving “national . . . minorities”<sup>296</sup> and *Pierce* as involving “religious . . . minorities.”<sup>297</sup>

The 1954 case of *Bolling v. Sharpe*<sup>298</sup> makes the equality dimension of due process even more explicit. Handed down the same day as *Brown v. Board of Education*,<sup>299</sup> *Bolling* held that segregation in public schools in the District of Columbia was unconstitutional.<sup>300</sup> The *Bolling* Court could not reach that result on the basis of the Fourteenth Amendment’s Equal Protection Clause, which applies only to the states. Undaunted, Chief Justice Warren wrote for a unanimous Court that the Fifth Amendment’s Due Process Clause could be used to secure the interests of equality:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the law” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>301</sup>

In Chief Justice Warren’s view, the guarantees of equal protection and due process were sufficiently related that extreme equal protection violations could be seen as due process violations.

*Bolling*, of course, has been subjected to virulent criticism as a purely results-driven case.<sup>302</sup> Yet the hypothesis articulated here — that our “liberty” and “equality” doctrines are intertwined — helps make better sense of *Bolling* on its own doctrinal terms. As *Bolling* states, liberty and equality are distinct but overlapping claims. Translating that statement into the terms of this Article, *Bolling* recognizes that the Due Process Clause of the Fifth Amendment is really a liberty-based dignity protection that incorporates, to some extent, guarantees of equal protection.

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<sup>296</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (citing *Meyer*, 262 U.S. 390).

<sup>297</sup> *Id.* (citing *Pierce*, 268 U.S. 510).

<sup>298</sup> 347 U.S. 497 (1954).

<sup>299</sup> 347 U.S. 483 (1954).

<sup>300</sup> *Bolling*, 347 U.S. at 500.

<sup>301</sup> *Id.* at 499.

<sup>302</sup> See, e.g., Peter J. Rubin, Essay, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1885–86 (2006) (“The conventional wisdom, though, is that the *Bolling* decision cannot bear scrutiny — with only *Brown* and *Roe* coming in for similar (and equally or more scathing) criticism. . . . Both of the leading constitutional law case books today ask whether it is indeed ‘unthinkable’ that the Constitution would impose a lesser duty upon the federal government with respect to racial discrimination than it does upon the states.”).

Chief Justice Warren reiterated his analysis of due process in *Bolling* in his 1967 majority opinion in *Loving v. Virginia*.<sup>303</sup> The *Loving* Court struck down a state antimiscegenation statute on both due process and equal protection grounds.<sup>304</sup> The sense of redundancy created by this double holding is compounded by the equality component of Chief Justice Warren's due process analysis: "To deny this fundamental freedom [of marriage] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."<sup>305</sup> At first glance, the idea that due process would also have an equality component seems an "unnecessary addendum."<sup>306</sup> Chief Justice Warren's motive, however, may have been to solidify the beachhead he established in *Bolling*. In taking this double-barreled approach, he overcame (as much as is possible in conventional doctrinal terms) the hermetic separation of liberty and equality claims, emphasizing again the interrelationship between the two.

*B. The "Rights" Strand of Equal Protection Jurisprudence*

The Court has also recognized the equality dimensions of liberty claims under the "rights" strand of equal protection doctrine.<sup>307</sup> The Warren Court recognized certain liberties, such as the right to travel, the right to vote, and the right to access the courts under the Equal Protection Clause. The evolution of this "substantive rights" strand of equal protection has occasioned puzzlement, as equal protection jurisprudence generally addresses the question of whether entitlements are being equally disbursed, rather than the question of whether those entitlements have vested as rights.

The confusion clears when we see that the rights in these cases all had equality inflections relating to indigency. The "right to travel" case concerned durational residency requirements for welfare that sought to exclude indigent individuals from out of state.<sup>308</sup> The "right to vote" case concerned a poll tax.<sup>309</sup> The "right to access the courts" case concerned a state requirement that a stenographic transcript be filed at the petitioner's expense before an appeal was taken.<sup>310</sup> In guaranteeing these rights, the Court vindicated the rights of the poor even

<sup>303</sup> 388 U.S. 1 (1967).

<sup>304</sup> *Id.* at 12.

<sup>305</sup> *Id.*

<sup>306</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 221 n.3 (1980).

<sup>307</sup> See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 654-92 (17th ed. 2010) (describing the "fundamental interests" branch of equal protection).

<sup>308</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>309</sup> See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

<sup>310</sup> See *Griffin v. Illinois*, 351 U.S. 12 (1956).

when it was ultimately unwilling to take the more far-reaching step of granting heightened scrutiny to wealth-based classifications.<sup>311</sup>

### C. Other Liberty-Based Dignity Claims

Due to issues of scope, I have mostly limited my analysis in this Article to the “substantive due process–equal protection synthesis.” However, there are many other liberty guarantees in the Constitution that are inflected with equality concerns; many of the criminal procedure amendments of the Bill of Rights come to mind.

I will gesture here toward one: the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>312</sup> While the Eighth Amendment has not been understood to prohibit the death penalty in absolute terms, it has recently been interpreted to prohibit the capital punishment of mentally retarded individuals<sup>313</sup> and juveniles.<sup>314</sup> This Term, the amendment was further interpreted to preclude the imposition of a life sentence without parole on a juvenile offender who did not commit homicide.<sup>315</sup> It may be hard to see these cases as internalizing equality norms, as the claim is not that mentally retarded individuals or juveniles be accorded the same treatment as individuals who are not mentally retarded or who are adults. These cases are less like *Lawrence* than like *Yoder*. They do not seek to have a right granted to some guaranteed to all. Rather, they seek to secure exemptions for particular groups from laws of general applicability. They do not ask for similarly situated individuals to be treated similarly in the manner of the equal protection rubric, but for differently situated individuals to be treated differently in the manner of the free exercise rubric.

Viewed through the free exercise lens, *Atkins v. Virginia*,<sup>316</sup> *Roper v. Simmons*,<sup>317</sup> and *Graham v. Florida*<sup>318</sup> begin to look more recognizably like liberty-based dignity claims. The idea underlying *Yoder* is that certain groups receive exemptions from laws of general applicability because of the injustice of general application. In the recent trilogy of Eighth Amendment cases, that sense of injustice is founded on the idea that these groups — the mentally disabled and juveniles — have been traditionally underrepresented in the political process. Yet this sense, once again, runs against the fact that traditional equal protec-

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<sup>311</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22–25 (1973) (holding that wealth-based classifications do not draw heightened scrutiny).

<sup>312</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>313</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>314</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>315</sup> See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

<sup>316</sup> 536 U.S. 304.

<sup>317</sup> 543 U.S. 551.

<sup>318</sup> 130 S. Ct. 2011.

tion analysis gives only rational basis review to classifications targeting both the mentally retarded<sup>319</sup> and age-based groups.<sup>320</sup>

While these Eighth Amendment cases seem to lie far beyond the traditional domain of equal protection or substantive due process, they still vindicate liberty-based dignity claims. They serve as a useful reminder that we should be attentive to the equality-based undertones to all liberty claims, not just those claims arising under the due process guarantees.

#### V. TOWARD A DEFENSE OF LIBERTY-BASED DIGNITY

The preceding analysis has demonstrated that the Court has relied on pluralism anxiety to close three equal protection doors. At the same time, the Court has not only permitted liberty doors to remain open, but also pushed them further ajar to compensate for judicial retrenchment under the equal protection guarantees.

Because I believe pluralism anxiety will only increase in future years, I take this shift to be largely inevitable.<sup>321</sup> Yet I also believe the Court has room at the margins to choose between the old and new models of equal protection. For instance, I can imagine the Court extending its rational basis with bite jurisprudence to new classifications. Moreover, even where the Court is unlikely to overturn regressive decisions under the traditional model, I believe it is worth offering critiques of its practice. The Court's restriction of Congress's powers seems particularly misguided, given that Congress should be less susceptible to pluralism anxiety than the judiciary. Thus, for both practical and critical reasons, it is important not just to observe the shift, but to offer a normative analysis.

In this Part, then, I move from the descriptive to the prescriptive. My conclusions here are significantly more tentative. My primary aim is to initiate a discussion of what is gained and lost by the Court's shift toward liberty-based dignity claims. I then offer two prescriptions. First, where a claim can be validly characterized as either a liberty-based or an equality-based dignity claim, it should be characterized as the former. Second, the Court should not constrain other institutional actors that may be more institutionally competent to deal with equality-based dignity claims from doing so.

##### A. *Advantages to the Liberty-Based Dignity Claim*

The largest advantage to the liberty-based dignity claim is that it combats pluralism anxiety to move toward Putnam's "new, broader

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<sup>319</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985).

<sup>320</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam).

<sup>321</sup> See Putnam, *supra* note 37, at 139–41.

sense of ‘we.’”<sup>322</sup> The new equal protection paradigm stresses the interests we have in common as human beings rather than the demographic differences that drive us apart. In this sense, the shift from the “old” to the “new” equal protection could be seen as a movement from group-based civil rights to universal human rights.

Put in its most positive light, pluralism anxiety is a blessing in disguise. It causes us to vary the human being in the imagination until we discover what is invariable about her. This process brings us to a clearer sense of which rights we need to flourish as human beings.<sup>323</sup> In the global context, we have already confronted massive diversity and responded with documents like the Universal Declaration of Human Rights<sup>324</sup> that offer more protection to rights than to groups. It is a cliché that the United States is increasingly becoming a microcosm of the world with respect to its diversity. The convergence of our national experience with the international one makes a movement from groups to rights seem organic and natural. I suspect it is no accident that a number of the cases I take to be paradigmatic examples of the “new equal protection” look to international and comparative law.<sup>325</sup> Cases such as *Lawrence*, *Atkins*, and *Roper* focus on rights that sound in a universal register.

The universality of such claims will make them more persuasive to many. Prominent advocates of same-sex marriage, for instance, argue for the “right to marry” rather than for the right to “marriage equality” or even the “right to gay marriage.”<sup>326</sup> One way to understand their insistence is to understand how these two claims sound differently to the American ear:

(1) “Gays should have the right to marry because straights have the right to marry and gays are equal to straights;” or

(2) “All adults should have the right to marry the person they love.”

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<sup>322</sup> *Id.* at 139.

<sup>323</sup> See generally Martha C. Nussbaum, *The Supreme Court, 2006 Term — Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) (integrating an Aristotelian-capabilities approach into the framework of recent U.S. constitutional jurisprudence).

<sup>324</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>325</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576–77 (2005) (collecting international and comparative law barring the execution of juveniles); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing international and comparative law supporting the existence of the right to sexual intimacy); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).

<sup>326</sup> See, e.g., FREEDOM TO MARRY, <http://www.freedomtomarry.org> (last visited Dec. 4, 2010) (website of Freedom to Marry Action Center, a flagship organization committed to securing the freedom to marry for same-sex couples).

The first is an equality claim and is prone to sounding like a “special rights” argument, especially to those who associate group-based civil rights with a culture of complaint. The second is a liberty claim and is more likely to sound like a “human rights” argument. As such, it may appeal to the libertarian streak in some conservatives.

The liberty claim is more persuasive because it performs the empathy it seeks. It frames the right at a high enough level of generality that opposite-sex couples are urged to imagine a world in which they were denied the right. In contrast, equal protection claims tend to stress distinctions among us, even as they ask us to overcome those distinctions. That exhortation is a performative contradiction. It asks us to transcend a distinction that the entity urging transcendence is unable itself to achieve.

It might be argued that it is utopian to believe that a movement by the Court toward liberty-based claims would have any effect on quieting pluralism anxiety. To be clear, the assertion is not that liberty claims quash such anxiety altogether, but merely that they do so more than equality claims. Even that refined assertion might be contested. Some decisions striking down bans on same-sex marriage have been sustained on *both* liberty and equality grounds,<sup>327</sup> and it may be hard to believe that these decisions would have been less controversial if they had relied solely on liberty grounds. To the polity at large, the received message may be nothing more than “gays win” or “gays lose.” Nonetheless, some courts and commentators believe something is at stake in how these claims are framed — the courts relying on both liberty and equality tend to lead with the liberty claim,<sup>328</sup> and, as noted, a prominent advocacy group calls itself “Freedom to Marry” to prioritize the liberty claim in a similar fashion.

Indeed, it may be that individuals who are experiencing the most “equality fatigue” are those who embrace the liberty argument most eagerly.<sup>329</sup> As the polity becomes more diverse, such “rights talk” can be a ground on which to create coalitions that embody broader, more inclusive forms of “we.” For instance, movements for a “right to education,” a “right to health care,” a “right to welfare,” or a “right to vote” that cut across traditional identity politics groups might helpfully erode the traditional group-based distinctions among them.<sup>330</sup> Review-

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<sup>327</sup> See, e.g., *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 WL 3025614, at \*66–68, \*76–77 (N.D. Cal. Aug. 4, 2010); *In re Marriage Cases*, 183 P.3d 384, 419–23, 443–46 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 957 (Mass. 2003).

<sup>328</sup> See *Perry*, 2010 WL 3025614, at \*66–68, \*76–77; *Marriage Cases*, 183 P.3d at 419–23, 443–46; *Goodridge*, 798 N.E.2d at 948, 957.

<sup>329</sup> See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

<sup>330</sup> As Professor Kathleen Sullivan observed two decades ago, constitutional doctrine generally views “involuntary group membership” as “presumptively irrelevant to public ends,” while seeking to enable “[v]oluntary group membership” to “live on and flourish.” See Kathleen M. Sulli-



ing the history of U.S. public policy relating to the poor, Professor Theda Skocpol observes that “when U.S. antipoverty efforts have featured policies targeted on the poor alone, they have not been politically sustainable, and they have stigmatized and demeaned the poor.”<sup>331</sup> In contrast, “more universal policies that have spread costs and visibly delivered benefits across classes and races have recurrently flourished.”<sup>332</sup> Professor Richard Pildes has made a similar point in the voting rights context, arguing that congressional voting rights legislation should shift from an “antidiscrimination” model to a “right to vote” model.<sup>333</sup>

A related advantage of liberty-based dignity analysis is that it is less likely to essentialize identity. A new wave of progressive scholarship has criticized the tendency of civil rights advocates to reify the social identities they purport to protect.<sup>334</sup> Such “left critiques of the left” argue that when the courts protect a trait as part of a group’s identity, they strengthen the very stereotypes they mean to disestablish.

Take the instance of language and national origin or race. In the 1991 case of *Hernandez v. New York*,<sup>335</sup> the Supreme Court considered whether peremptory strikes exercised based on the capacity of potential jurors to speak Spanish violated the Equal Protection Clause. Strikes on the basis of race (and by implication national origin) had been deemed impermissible in 1986.<sup>336</sup> A majority of the Justices in *Hernandez* deemed that the strikes in that case were not race-based or national origin-based because they were motivated by a concern that Spanish-speaking jurors would not defer to court translations of testimony in Spanish.<sup>337</sup> The case was a straightforward application of *Davis* — in the absence of discriminatory intent, a facially neutral practice (language-based strikes) that negatively impacted a protected group (a national-origin minority) would not trigger strict scrutiny.

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van, Symposium Comment, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1716 (1988). Sullivan argued that certain forms of republican theory err in privileging groups based on involuntary characteristics over voluntary associations. *Id.* Following Sullivan, I encourage us to consider voluntary “rights”-based coalitions (such as a coalition around the right to education) that might beneficially cut across traditional “involuntary” groups such as those based on race or sex.

<sup>331</sup> Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in THE URBAN UNDERCLASS 411, 414 (Christopher Jencks & Paul E. Peterson eds., 1991).

<sup>332</sup> *Id.* at 420.

<sup>333</sup> See Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006).

<sup>334</sup> See generally RICHARD THOMPSON FORD, RACIAL CULTURE 90–123 (2005); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195 (2003).

<sup>335</sup> 500 U.S. 352 (1991).

<sup>336</sup> See *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

<sup>337</sup> *Hernandez*, 500 U.S. at 370–72.

Traditional liberals tend to object to this outcome. But “left critiques of the left” find the outcome favored by those liberals equally problematic. The concern is that if the Court protects language-based strikes as national origin-based strikes, the Court will risk essentializing the group in question.<sup>338</sup> To protect the capacity to speak Spanish as a part of being Latino is to reify the identity of “being Latino.” It is also to invite a steady stream of litigation that will end in having the Court tell us which attributes are a constitutive part of Latino identity and which are not. Of course, if the Court were to overrule *Davis*, the Court could protect “speaking Spanish” as an attribute correlated with being Latino rather than an attribute constitutive of that identity.<sup>339</sup> Yet even in that instance, the Court would still have to produce a definition of what “being Latino” was. Assuming that no formal biological definition (such as genes or skin color) exists, this definition would inevitably essentialize certain cultural definitions of race.

Liberty analysis avoids this problem. If there were a liberty-based right to speak one’s native or first language, for instance, peremptory strikes on the basis of language could be deemed impermissible as such in the absence of an adequate countervailing governmental interest. That protection would entail no assumptions about the relationship between certain behaviors and certain groups — it would be a universal protection that would shelter English speakers as much as non-English speakers. At the same time, in a country where English is the dominant language, such a protection would clearly have an equality component.

Recall that Putnam described “the central challenge for modern, diversifying societies” to be the creation of certain forms of bridging capital.<sup>340</sup> A Supreme Court jurisprudence that focuses on universal liberties guaranteed to all persons or citizens<sup>341</sup> under the Constitution could be an important part of that project. Equality claims inevitably involve the Court in picking favorites among groups, a practice attended by pluralism anxiety. Liberty claims, in contrast, emphasize what all Americans (or, more precisely, all persons within the jurisdiction of the United States) have in common. The claim that we all have a right to sexual intimacy, or that we all have a right to access the courts, will hold no matter how many new groups appear in this coun-

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<sup>338</sup> See generally FORD, *supra* note 334.

<sup>339</sup> See generally Yoshino, *Covering*, *supra* note 104.

<sup>340</sup> Putnam, *supra* note 37, at 139.

<sup>341</sup> I make this distinction because while the Privileges and Immunities Clause of the Fourteenth Amendment protects only citizens, the Due Process Clause of the same amendment protects all persons within the jurisdiction of the United States. U.S. CONST. amend. XIV, § 1. From a progressive standpoint, the more expansive protections offered by the Due Process Clause are a felicitous, unintended consequence of the foreclosure of the Privileges and Immunities Clause by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

try. As such, liberty-based dignity claims may be one way in which we fashion a new, more inclusive sense of “we.”

*B. Disadvantages to the Liberty-Based Dignity Claims*

I have so far offered an optimistic account of the new equal protection. Some might even call it Panglossian: because we live in the best of all possible worlds, the Court must be moving steadily in the right direction. It is now time to sound some cautionary notes. I turn to four objections to the liberty-based dignity claim.

The first objection argues that even if increasing pluralism is inevitable, increasing pluralism anxiety is not. At the individual level, we do not encourage individuals to capitulate to their anxieties, but to overcome them. We should then ask why societies are not similarly pressed to surmount their anxieties rather than to surrender to them. If justice resides at the bottom of the slippery slope, we might welcome the swift slide there. If twenty classifications merit heightened scrutiny, we should accord such scrutiny to them all. If state action has a disparate impact on a protected group, we should require the state to justify its actions, overruling *Washington v. Davis*, *Personnel Administrator v. Feeney*, and *Employment Division v. Smith* along the way. Any argument to the contrary is, as Justice Brennan put it in a different context, an argument against “too much justice.”<sup>342</sup>

I think this argument is too utopian, at least in this raw form. We may someday have six or seven heightened scrutiny classifications rather than five. But we cannot have twenty without diluting the meaning of heightened scrutiny. Similarly, I have difficulty seeing how a return to disparate impact analysis could be accomplished, particularly in the free exercise context, where the number of groups is potentially infinite. Unless we want the Court to go back to evaluating the validity of every asserted religion, which I emphatically do not want, then it would be hard not to risk having every individual become a law unto herself.

To be clear, my pessimism about the judiciary’s capacity to “do” group-based equality in traditional terms does not extend to other actors. To the contrary, in an age of pluralism anxiety, the political branches may be more institutionally competent than the courts to do group-based civil rights. Professor Robert Burt recognized this long ago, in observing that Congress was a less constrained line-drawer.<sup>343</sup> Defending *Katzenbach v. Morgan* in 1969, Burt wrote:

Congress can make distinctions among classes that the Court would itself be hard put to explain on principled grounds both because Congress is

<sup>342</sup> *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>343</sup> Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112.

more sensitively tuned to the competing social interests that demand accommodation and because the institutional legitimacy of a legislative act depends not so much on the rational persuasiveness of its decisions as on the simple fact that a majority of “responsible” elected officials were willing to vote for the proposition.<sup>344</sup>

In other words, while Congress *can* give reasons for picking and choosing among groups, it does not *have* to do so. What is curious about the *Garrett* Court’s invocation of Justice White’s objection in *Cleburne* about how no “principled” distinctions can be made among groups<sup>345</sup> is that it fails to acknowledge that Congress need not make such principled distinctions. The problem with *Boerne* and its progeny is that they tie Congress’s powers to enact civil rights legislation to judicial interpretations without leveraging productive differences in institutional competence. And of course, even if the Court adheres to *Boerne*, state legislatures and other political bodies can engage in such group-based civil rights more aggressively than the Court can.

The second critique is a narrower, more powerful version of the first. It does not contend that the movement from group-based equality to liberty-based dignity is a mistake across the board. It instead observes that with respect to certain groups, we should be careful about jumping too quickly to a higher level of generality. In certain circumstances, such as the right to sexual intimacy, adverting to a higher level of generality identifies a commonality among the relevant groups (such as straights and gays). In other situations, moving to that higher level of generality papers over the subordination in need of judicial correction.

A classic instance of the latter situation concerns the right to abortion. To speak of the right to reproductive autonomy elides the real biological differences between men and women that make the exercise of this right completely different for the two sexes. In the 2007 case of *Gonzales v. Carhart*,<sup>346</sup> the Court upheld the federal Partial-Birth Abortion Ban Act of 2003.<sup>347</sup> One of the arguments the Court used related to the regret women allegedly feel after they have abortions.<sup>348</sup> As Justice Ginsburg pointed out in her dissent, this romantic paternalism had been rejected by the Court long ago in its equal protection ju-

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<sup>344</sup> *Id.* at 113–14.

<sup>345</sup> *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445–46 (1985)).

<sup>346</sup> 550 U.S. 124 (2007).

<sup>347</sup> Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (2006)); *Carhart*, 550 U.S. at 132.

<sup>348</sup> *Carhart*, 550 U.S. at 159 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

jurisprudence.<sup>349</sup> Simply because the *Carhart* majority moved its analysis one clause over, these hard-won victories against sex-stereotyping seemed inapplicable.

Of course, one could correct for this shift by observing that the problem with *Carhart* was not that the Court analyzed the abortion issue under the Due Process Clause, but that it did not sufficiently internalize equality concerns into that analysis. *Roe* and *Casey* were true liberty-based dignity cases. While both analyzed the abortion right under the Due Process Clause, both also kept the equality dimensions of the case steadily visible.<sup>350</sup> *Carhart* departed from this tradition, insofar as it reinstated subordinating conceptions of women that had been retired in the equal protection context in the 1970s.

The *Carhart* decision, however, still stands as a cautionary tale against the dangers of a liberty-based dignity jurisprudence. Because this jurisprudence foregrounds liberty concerns over equality concerns, it risks effacing enduring forms of group-based subordination. My intuition is that this risk will be particularly true in contexts where differences between the relevant groups are both persistent and differentiating, as in the contexts of sex or disability. Historically, the doctrine of “real biological differences” between the sexes has been used more by conservatives than by progressives on the Court.<sup>351</sup> However, as liberal scholars of different stripes and times have noted, such real differences (biological or not) should also prevent progressives from moving too quickly to a universal register.<sup>352</sup>

A third critique is that liberty-based dignity claims allow subordinated groups to contest their subordination only in a piecemeal fashion. Professor William Eskridge maintains:

[R]egular equal protection and due process scrutiny might be either interchangeable or interdependent at the *retail level*, that is, in challenges to particular discriminations, especially penalty-based ones. But the Equal Protection Clause alone offers a minority group a potential constitutional jackpot at the *wholesale level*, that is, in challenges to an array of interconnected discriminations in state benefits as well as burdens.<sup>353</sup>

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<sup>349</sup> *Id.* at 185 (Ginsburg, J., dissenting).

<sup>350</sup> *See supra* p. 783.

<sup>351</sup> *See* *Nguyen v. INS*, 533 U.S. 53, 62–64 (2001); *Michael M. v. Superior Court*, 450 U.S. 464, 468–69 (1981).

<sup>352</sup> *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); ROBIN WEST, *CARING FOR JUSTICE* (1997).

<sup>353</sup> William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 *UCLA L. REV.* 1183, 1216 (2000); *see also* Heather K. Gerken, Symposium, *Larry and Lawrence*, 42 *TULSA L. REV.* 843, 851 (2007) (“Even as the liberty paradigm pushes towards universalism, it seems to require members of the LGBT community to litigate pieces of their humanity, one by one.”).

This statement underscores the across-the-board benefit an equal protection victory might entail. However, there are several issues here, many of which are implicitly anticipated in Eskridge's phrasing. As an initial matter, the Equal Protection Clause offers only a *potential* jackpot, insofar as certain deployments of the Equal Protection Clause have been limited to the facts of the case, as in *Romer* or in *Cleburne*. What Eskridge is pointing to here, then, must be some form of equal protection heightened scrutiny. Yet it is precisely the wide-ranging nature of such an equal protection holding that makes it so difficult to attain, as evidenced by the closure of the heightened scrutiny canon of classifications in 1977. So while this statement about equal protection is true in theory, it scants the practical difficulties that made the Court lower the boom on heightened scrutiny classifications in the first place. Moreover, it is important to observe that, as noted earlier, the equal protection guarantees allow for leveling down as well as for leveling up. Even under heightened scrutiny, a state would be perfectly capable of having sodomy statutes or banning marriage, so long as it did so across the board. While this policy would indeed liberate gays from discrimination, it would not necessarily secure the entitlement sought, given that the state could respond by denying it to all.

A final objection to the liberty-based dignity paradigm is that it is a false rescue because it substitutes one slippery slope for another. Pluralism anxiety directs our attention to the group-based slippery slope, in which it seems that an endless queue of groups clamor for our attention. A movement from equality to liberty seems to solve this problem, as it focuses on rights that belong to all. However, an approach that foregrounds liberty raises a different question. It replaces the question of which groups should be protected with the question of which rights should be protected.

Again, I do not purport to have a full rejoinder to this criticism here. My intuition, however, is that the slope of rights is less slippery than the slope of groups. I have seen lists of rights that could be deemed fairly comprehensive — I think, for instance, of Professor Martha Nussbaum's catalogue of capabilities.<sup>354</sup> I have never, however, seen a list of groups that felt even remotely comprehensive.

For those who do not share my intuition, I would further point out that equality itself can operate as a brake on the liberty-based slippery

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<sup>354</sup> See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 78–80 (2000) (listing ten capabilities that should be supported by all democracies because of their integral relationship to human flourishing, including: (1) Life; (2) Bodily Health; (3) Bodily Integrity; (4) Senses, Imagination, and Thought; (5) Emotions; (6) Practical Reason; (7) Affiliation; (8) Other Species; (9) Play; (10) Control over One's Environment). The original idea of human capabilities was introduced by Professor Amartya Sen. See AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

slope. In a liberty-based dignity paradigm, equality concerns can lead the Court to *deny* as well as to *recognize* the ostensible liberty. In asserting the existence of a constitutional “freedom of contract” in *Lochner v. New York*,<sup>355</sup> the Court stated that there was no evidence that bakers were uniquely vulnerable as a class. Three years after *Lochner*, however, the Court unanimously upheld an Oregon regulation limiting the working hours of women because women *were* such a class. As the Court stated in *Muller v. Oregon*<sup>356</sup>:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.<sup>357</sup>

In an analysis supported by the first “Brandeis brief”<sup>358</sup> comprehensively documenting the working conditions of women, the Court limited the ambit of the “freedom of contract.”<sup>359</sup>

*Lochner*’s complex status in our constitutional jurisprudence suggests that another example is in order. In the 1997 case of *Washington v. Glucksberg*,<sup>360</sup> the Court declined to find a right to physician-assisted suicide. One of the rationales for its decision was that “the State has an interest in protecting vulnerable groups — including the poor, the elderly, and disabled persons — from abuse, neglect, and mistakes.”<sup>361</sup> The Court discussed how “[t]hose who attempt suicide — terminally ill or not — often suffer from depression or other mental disorders.”<sup>362</sup> It also observed that “[t]he State’s interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference.’”<sup>363</sup>

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<sup>355</sup> 198 U.S. 45 (1905). *Lochner*, of course, was effectively overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>356</sup> 208 U.S. 412 (1908).

<sup>357</sup> *Id.* at 421.

<sup>358</sup> Louis Brandeis, who would become a Supreme Court Justice in 1916, pioneered the use of briefs that have come to bear his name. These briefs relied on an exhaustive analysis of factual data rather than simply on legal theory.

<sup>359</sup> 208 U.S. at 419 (noting that Mr. Brandeis’s brief contained “a very copious collection of all these matters [relating to the working conditions of women]”).

<sup>360</sup> 521 U.S. 702 (1997).

<sup>361</sup> *Id.* at 731.

<sup>362</sup> *Id.* at 730.

<sup>363</sup> *Id.* at 732 (quoting *Compassion in Dying v. Washington*, 49 F.3d 586, 592 (9th Cir. 1995)).

What do classifications involving “the poor, the elderly, and disabled persons” have in common? All are classifications that have been explicitly denied heightened scrutiny — indigency in *San Antonio Independent School District v. Rodriguez*,<sup>364</sup> age in *Massachusetts Board of Retirement v. Murgia*,<sup>365</sup> and disability in *Cleburne*.<sup>366</sup> Yet the social subordination of these groups is a core reason why the Court rejected the right to physician-assisted suicide. The Court knows a vulnerable group when it sees one — as it did in *Muller*, sixty-eight years before sex-based distinctions were formally granted heightened scrutiny in *Craig v. Boren*.<sup>367</sup> The fact that social subordination presses the Court to refuse rights (as in *Muller* or *Glucksberg*), as well as to grant rights (as in *Lawrence*, *Roe*, or *Lane*), means that equality can be a brake as well as a goad on the rights-based slippery slope. This fact, too, suggests that the rights-based slope may not be as slippery as it seems.<sup>368</sup>

### CONCLUSION

This Article has sought to make a strong positive claim and a weak normative one. The strong positive claim is that pluralism anxiety has driven the United States Supreme Court to shift from its traditional equal protection jurisprudence toward a liberty-based dignity jurisprudence. This liberty-based dignity jurisprudence synthesizes both equality and liberty claims, but leads with the latter to quiet pluralism anxiety in an increasingly diverse society.

The weak normative claim is that this shift is not just largely inevitable, but also in many ways desirable. Having the judiciary lead with claims that sound in universal human rights rather than group-based civil rights creates social bridging capital that retains a more unified sense of “We, the People.” The concern, of course, is to ensure that this concept of liberty-based dignity does not jettison equality claims altogether.

An attempt to maximize the advantages and minimize the disadvantages of the move toward liberty suggests at least two prescriptions. The first is that where a constitutional claim can be plausibly framed as either a liberty-based dignity claim or an equality-based dignity claim, it should be framed to the Court as the former. There

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<sup>364</sup> 411 U.S. 1 (1973).

<sup>365</sup> 427 U.S. 307 (1976).

<sup>366</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>367</sup> 429 U.S. 190 (1976).

<sup>368</sup> It might be said that the use of equality concerns to discipline liberty concerns merely defers the “too many groups” problem rather than resolving it. However, even if this claim is true, foregrounding liberty concerns over equality concerns is more likely to create the bridging capital that will quiet pluralism anxiety.



will be times when this strategy will not be possible, and in these instances, progressives should fight out their claims on traditional equal protection grounds. The second prescription is that the Court should recognize that it can leverage differences in institutional competence with respect to constitutional civil rights. The Court is particularly susceptible to the “too many groups” problem posed by pluralism anxiety because it is a forum that must always give principled reasons for the distinctions it makes among groups. Other bodies, such as legislatures (and certainly private actors) are not so burdened. These other actors are therefore better able to entertain and advance traditional equality-based dignity claims. Both prescriptions flow from the understanding that at least in the courts, a shift in emphasis is occurring from group-based civil rights to universal human rights. This is the new equal protection.